(B)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. [redacted] 91

THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA,

Petitioner,

vs.

NELLIE B. WIGGINTON.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1242

THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA,

Petitioner,

vs.

NELLIE B. WIGGINTON.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Harlan F. Stone, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

PART I.

Summary and Short Statement of the Matter Involved.

As an introduction to this statement, it is proper to say that the facts upon which the issues were tried were all stipulated (R. 14, and then to 21-28). (The opinion is reported in 126 F. (2d), p. 659.)

This action at law was begun by the respondent-plaintiff, by the filing of her complaint against the petitioner-defendant on August 19, 1940, in the Superior Court of Vanderburgh County, Indiana. The case was properly removed to the District Court of the United States, for the Southern District of Indiana, on October 2, 1940, and upon appeal from that court to the Circuit Court of Appeals, the parties stipulated that, this petitioner had been duly served with summons in the State court, the cause properly removed, and the District Court had jurisdiction to render its judgment (R. 6-7).

The complaint (R. 1-5) alleged in substance that the petitioner-defendant is a fraternal benefit association incorporated under the laws of the State of Ohio, that respondent-plaintiff's decedent, Charles S. Wigginton, was issued a certificate of membership at Columbus, Ohio, on January 15, 1906 (R. 2, 4, 23-24). (His application for membership was signed August 25, 1905 (R. 22, Stip. of Facts #3); on January 2, 1914, he was issued a Class A Insurance Certificate at Columbus, Ohio (R. 5, 23-24, Stip. of Facts #5); that at the time of his death, the plaintiff's decedent was a Class A insured member in good standing, who had performed all of the conditions precedent to recovery, as had the plaintiff at the time of the bringing of the action; that the plaintiff's decedent died on November 4th, 1939, of a gunshot wound as a result of the alleged accidental discharge of a firearm, independent of all other causes.

The respondent-plaintiff claimed that she was entitled to recover Five Thousand Dollars ($5,000.00) with interest from November 4, 1939.

The petitioner-defendant filed its answer, consisting of Four Defenses, on November 2, 1940 (R. 8 to 10); thereafter and before trial, the Third Defense, a suicide defense,

was withdrawn with the consent of the respondent-plaintiff (R. 14) and likewise an amended Fourth Defense was filed before trial, on March 25th, 1941, with the consent of the respondent-plaintiff (R. 11-13).

The Amended Fourth Defense (R. 11-13) upon which the issues were actually formed, admits that the petitioner-defendant is a fraternal benefit association but adds that it was at all times authorized to do business in the State of Indiana; it admits the facts as to application for membership, the certificate of membership and the issuing of the Class A Insurance Certificate, but it points out and stresses the fact that these constituted a contract made, executed and completed in Ohio, and that under each and all of them, constituting the contract, the decedent agreed to be bound by the contract as it existed at the time of his death, that is, that he agreed to be bound by subsequent amendments to the Constitution of the Order (R. 11 to 12 and 21 to 26, Stip. of Facts #1 to 6 and 8 to 11).

This defense further says that this petitioner-defendant, at the annual session of the Supreme Council of the Order held in the year 1931, duly amended the Constitution of the Order by adopting the following amendment:

> "Nor shall the Order be liable for any death benefit when the member dies as the result of injuries sustained as a result of a gunshot wound or the alleged accidental discharge of firearms where there is no eyewitness except the member himself, in an amount greater than Five Hundred Dollars ($500.00)." (R. 12, also 24-25, Stip. of Facts #7).

This defense then says:

> "That the insured member, the said Charles S. Wigginton, did, on the 4th day of November, 1939, die as the result of injuries sustained as a result of a gunshot wound where there was no eyewitness except the member, himself" (R. 13).

The parties stipulated all of the facts (R. 14, then turn to 21 to 28) and the case was tried on April 14, 1941, without a jury (R. 15-20) upon the complaint (R. 1-5), the First and Second Defenses (R. 9 at bottom) and the Amended Fourth Defense (R. 11-13).

The stipulated facts, out of which this petitioner-defendant claims the ultimate fact of "a discharge of a firearm, where there was *no eyewitness except the member himself*", is the only ultimate fact which can be inferred as a matter of law, are the following:

> "12. On November 4, 1939, the insured member, Charles S. Wigginton, received a gunshot wound as the result of the discharge of a firearm and as the result of said gunshot wound, and independently of all other causes, died within a few seconds thereafter.
>
> "13. The insured member's office on November 4, 1939, was in room 906 on the ninth floor of the Citizens National Bank Building in the City of Evansville. About 12:15 o'clock on the afternoon of November 4, 1939, he took his shotgun and placed it on his desk in his office for the purpose of cleaning it. He also placed on his desk at the same time a can of oil, a cleaning rag, the cleaning rod and his pocket knife, and actually started to clean the gun. This was observed by Mildred McGowan, his secretary, who left the office about 12:15 P. M., and at the time she left the office he was cleaning the gun.
>
> "Reese Young was a coal dealer in the City of Evansville who purchased coal from Mr. Wigginton's Company. Shortly before 12:00 o'clock noon, he had called Mr. Wigginton by telephone and made an appointment for about 1:30 P. M. to talk to him about the problem of a shortage of coal and his desire to get regular deliveries.
>
> "After Mr. Wigginton's Secretary left the office, he also left his office and was taken to the ground floor of the building in an elevator operated by Freda Chapel. This was about 12:45 P. M. He returned to

the elevator about ten (10) minutes before his death and was taken to the ninth floor of this office building in an elevator operated by Ocie Lemon, with whom he had a conversation while on the elevator.

"Between 1:15 and 1:30 P. M., Reese Young stepped from the elevator on the ninth floor of this building and immediately after stepping from the elevator and before taking more than three (3) steps from it, he heard a sound resembling a gunshot. At this time he was in a position where he could see the length of the hallway to the door of Charles S. Wigginton's office but he could not see into the office. He did not see any person in the hallway at that time. The door of Mr. Wigginton's office opened off of the side of the hallway and Reese Young could not see into his office until he reached the doorway. He walked without accelerating his speed from that point down the hallway, a distance of fifty-three (53) feet, taking him approximately twelve (12) seconds from the time he heard the gunshot to the office of Charles S. Wigginton, and saw that the door was open and saw the body of Charles S. Wigginton lying on the floor of the office, and saw the shotgun and cleaning articles lying on the desk with the barrel of the shotgun pointed toward the chair of Mr. Wigginton behind his desk. He did not see anyone else in the room at that time.

"In a few moments several other people came into the room. A physician, Dr. Herbert Dieckman, was immediately called and it was found that Charles S. Wigginton had died from a gunshot wound to his left chest and head and that death was practically instantaneous. One barrel of the shotgun which was lying on the desk had been discharged."

(R. 26-27, Stip. of Facts 12 and 13.)

The District Court announced its Special Finding of Fact (R. 21 to 28) and Conclusions of Law (R. 28) on June 30, 1941, and rendered judgment on the same day in favor of respondent-plaintiff in the sum of Fifty-two Hundred Sixty-two Dollars and Fifty Cents ($5262.50) (R. 21).

Thereafter, an appeal was taken to, and by proper action jurisdiction was acquired by, the United States Circuit Court of Appeals for the Seventh Circuit to review the above judgment on appeal. The latter court affirmed the above judgment on appeal, to review which action this Petition is filed.

NOTE: The facts showing the jurisdiction of this Court are set out under Part II hereof.

PART II.

Statement Disclosing the Basis Upon Which It Is Contended This Court Has Jurisdiction to Review This Judgment.

A.

The original complaint was by Nellie B. Wigginton, respondent-plaintiff, a citizen of Indiana, brought in the Superior Court of Vanderburgh County, State of Indiana, against the petitioner-plaintiff, a corporation incorporated under and doing business under the laws of the State of Ohio, to recover the sum of Five Thousand Dollars ($5,000.00) with interest from November 4, 1939, which action was duly removed to the District Court of the United States for the Southern District of Indiana, and filed and docketed in the Evansville Division in the United States Court House in the City of Evansville, Indiana (R. 1-5).

Said Court rendered judgment in favor of the respondent-plaintiff and against this petitioner-defendant on June 30, 1941, in the sum of Five Thousand Two Hundred Sixty-two Dollars and Fifty Cents ($5,262.50), together with interest from June 30, 1941, and costs (R. 21).

The parties, in preparing the record for appeal from that District Court to the United States Circuit Court of Appeals for the Seventh Circuit, stipulated that the Dis-

trict Court had jurisdiction of the parties and the subject matter (R. 6-7).

B.

(1).

The United States Circuit Court of Appeals for the Seventh Circuit on February 9th, 1942, rendered its opinion (R. 61 to 74) in Cause No. 7785, reported in 126 Fed. (2) 659, and entered judgment affirming the judgment of the District Court (R. 74).

(2).

On February 20th, 1942, this petitioner-defendant, filed in the aforesaid Court in said Cause No. 7785, its petition for rehearing and brief in support thereof (R. 75). This petition was filed within the fifteen days permitted by the rules of said court, Rule 22, page 12, of the Rules of the United States Circuit Court of Appeals for the Seventh Circuit, Effective May 31, 1941.

(3).

On April 13th, 1942, said court in said cause #7785, made and entered its order (R. 75) which reads as follows:

> "It is ordered by the court that the petition and brief of appellant for rehearing heretofore filed on February 20, 1942, be stricken from the files of this Court because of the impertinent and scandalous matter contained therein.
>
> "It is further ordered by the court that the mandate of this Court in this cause issue forthwith to the District Court of the United States for the Southern District of Indiana."

C.

This petitioner duly filed in this Court, this, its printed Petition for Writ of Certiorari to the United States Circuit

Court of Appeals for the Seventh Circuit, together with its Brief in Support Thereof, and one printed certified copy of the Transcript below, together with the requisite number of printed copies of the Transcript, this Petition and the Brief in support thereof, as required by the rules of this Court, are filed with the Clerk of this Court on the 15th day of May, 1942.

D.

Wherefore, the petitioner says that this Court has jurisdiction to entertain this, its petition for writ of certiorari, and to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit, review of which is sought hereby.

(1) The jurisdictional amount is present (Title 28, Ch. 2, Sec. 41 (1) U. S. C. A.; Jud. Code, Sec. 24, as amended).

(2) The requisite diversity of citizenship is present (Title 28, Ch. 2, Sec. 41 (1) (b), U. S. C. A.; Jud. Code, Sec. 24, as amended).

(3) The petition for this writ of certiorari is filed within time (Title 28, Ch. 9, Sec. 350, U. S. C. A.).

(4) A petition for rehearing was seasonably filed (II, B, (2), *supra*) which suspends the time limited by the last cited section of the statute until disposed of.

Gypsy Oil Co. v. *Esco,* 275 U. S. 498, 72 L. Ed. 393, 48 S. C. R. 112;

N. L. R. B. v. *Mackay, etc.,* 304 U. S. 333, 82 L. Ed. 1381, 58 S. C. R 904;

The Conqueror, 116 U. S. 110, 113-4; 17 S. C. R. 510.

(5) This petition having been seasonably filed, the discretionary right or power of this Court for determination and review is invoked. Jud. Code, Sec. 240 (a), amended, U. S. C. A., Title 28, Sec. 347 (a).

Part III.

The Questions Presented.

Preliminary Statement.

Two of the questions presented, of which complaint is made, arise out of the construction of the following clause in the petitioner's Constitution and the analysis of the facts made by the Circuit Court of Appeals in determining that an ultimate fact necessary to satisfy the contract was present, whereas the reasoning processes by which the ultimate fact was found are illogical and therefore repudiated by the law of Indiana. The clause of the Constitution reads as follows:

> "Nor shall the Order be liable for any death benefit when the member dies as the result of injuries sustained as a result of a gunshot wound or the alleged accidental discharge of firearms where there is no eyewitness except the member himself, in an amount greater than Five Hundred Dollars ($500.00)."

There is no decided case in Indiana expressly construing this eyewitness clause of the petitioner's constitution; consequently, the Circuit Court of Appeals was bound to declare the law of this case, but it was bound to do so *under the general principles of law,* then prevailing in the State of Indiana. The opinion states that the court was bound to declare the law (R. 64, 1.18 to 1.26). The obligation to declare it in accordance with the then existing rules of law of the State of Indiana is, of course, implied. This implication arises because, under the burden placed by *Erie R. R.* v. *Tompkins,* 1938, 304 U. S. 64, 82 L. Ed. 1188, 58 S. C. R. 817, a Federal court cannot violate the general rules of the law of Indiana, as declared by the highest court of that State, either in drawing inferences from stipulated

facts, or in construing the meaning of the words of a contract.

It is the petitioner's contention that the opinion does violate the general rules of law of the State of Indiana in two particulars, hereinafter set out as "A" and "B" under this subdivision of the petition, which constitute the first two questions presented.

The petitioner also respectfully represents that the record in this case presents a question which is passed over by the opinion (R. 63, 1st rhet. par.), and so not decided harmfully to the petitioner, but the question is one which has arisen previously in another district court of the United States in which there is a reported opinion (*Cray, McFawn & Co.* v. *Hegarty, et al.,* (Dist. Ct., So. Div. N. Y., 1939, 27 Fed. Supp. 93, 95, Syll. 1)). It is novel, but apparently is actually bothering lawyers and judges in the courts of the United States, namely:

Does the law as declared in *Erie R. R.* v. *Tompkins,* 1938, 304 U. S. 64, deprive a Federal court of the power to take judicial notice of the laws of all of the States of the Union, as first announced in *Owing* v. *Hull,* 1935, 9 Peters, 607, 34 S. C. R. 246, 253, and ever since accepted as the law?

This last question will be presented under C, under this subdivision of the petition.

A.

The opinion declares an ultimate fact to arise from the stipulated facts by mental processes which an analysis of the opinion discloses are illogical and therefore contrary to the law of the State of Indiana.

(1).

The opinion follows the leading case of *Lewis* v. *Brotherhood Acc. Co.,* 1907, 194 Mass. 1, 79 N. E. 802, 804-807,

which first construed a clause similar in purport to the one hereinabove set out, and which is recognized as the leading authority upon the construction to be given the clause in question; namely, that the "eyewitness" need not see the actual event happen, but that the clause will be satisfied if there is an eyewitness of primary facts from which the "operating cause" of the accidental event may be inferred.

(2).

The opinion correctly draws the analogy between the canoe being paddled upon the river in the *Lewis* case and the primary facts necessary to show an operating cause in a discharge of firearms case, and declares its construction correctly in the following language:

> "What was the operating cause in the case at bar? In the Lewis case, it was the *tricky canoe being paddled in the river.* In the case at bar, it was a *loaded shotgun in the process of being cleaned.*" (The italics are ours) (R. 72, first three sentences in last rhet. par.)

(3).

The opinion then continues to set out and to analyze the facts out of which it declares there arises the inference that the witness, Mrs. McGowan, *witnessed the operating cause which caused the death* of the respondent-plaintiff's decedent. (R. 72, beginning with 4th sentence in last rhet. par., and ending with 2nd sentence in first rhet. par., p. 73).

Mrs. McGowan witnessed the gun being cleaned at 12:15, a then potential operating cause; that is, the *actual cleaning* of the gun; she never saw him alive after 12:15 P. M., and further, the record shows, the part of the transcript cited discloses, and the opinion says, that Wigginton abandoned this operating cause between twenty-five and forty-five minutes prior to his death. He left his office and went

out into the city for this period of time—after he returned, about ten minutes before his death, no one saw him. (R. 26, Stip. of Facts #13).

Remembering that it is the actual cleaning of the gun which is the operating cause, not a gun surrounded by cleaning materials (*Werner* v. *T. P. A.*, 1929, (D. C. Tex.) 3 Fed. (2) 803, aff'd 1930 (C. C. A. 5) 37 F. (2) 96, 97; *Roeh* v. *Bus. Men's Assn*, 1914, 164 Ia. 199, 145 N. W. 479, 480-482), it is apparent that the operating cause of Wigginton's death *was a new and different one* which arose during the ten minutes after he returned to his office, and no one saw him or this new, *actual operating cause* in action, while he was in the solitude of his office,—certainly Mildred McGowan did not.

(4).

The petitioner contends, therefore, that the opinion of the court below, whereby it made Mildred McGowan an eyewitness of the death of plaintiff's decedent, is not logically tenable, and the law in Indiana requires that inferences shall be reached by logical methods, and that if an ultimate fact cannot be established by a logical inference, a party must fail.

Cleveland, etc. R. R. v. *Miller, Admr.*, 1898, 149 Ind. 490, 507;

Russell v. *Scharfe*, 1921, 76 Ind. App., 191, 197.

NOTE: The Brief presents a more elaborate analysis of this error in logic.

B.

The opinion declares an ambiguity to exist in the clause in question, which ambiguity cannot arise by according to the language of the section its "popular and usual significance".

(1).

The opinion says:

> "Furthermore, we think the provision of the constitution of the appellant order under consideration in this case is ambiguous. It provides that there must be an eyewitness. Witness to what? The dying or the shooting? Surely, it cannot be said that this provision is clear as to which one is meant. We are unable to determine from a reading of the provision which one is meant. Contracts of insurance are construed most strongly against the insurance company, and so as to give protection to the insured if this can reasonably be done. Masonic Acc. Ins. Co. *v.* Jackson, 200 Ind. 472, 164 N. E. 628.
>
> "In the case at bar, there was an eyewitness to the death of the insured. Mr. Young was upon the scene within twelve seconds. It is a fair inference, which we are authorized in this case to draw, that Young saw Wigginton dying. It is reasonable to construe the policy, which is ambiguous, so as to mean that there shall be an eyewitness to the "dying". We so construe it. Young was the eyewitness to the dying. Therefore, the requirements of the policy were met."
>
> (R. 73, last two par., to top of p. 74).

(2).

The opinion states its own ambiguity, that the clause in question requires an eyewitness to the accidental discharge, (which every other court in the United States has said it means), or it may be satisfied by an eyewitness to the "dying" (which no other court has said).

Since the opinion also says that the contract requires the *operating* cause to be observed (R. 72, 1st three sentences in last rhet. par.), an eyewitness to the "dying", who only observed an *operated* cause, the effect, the "dying", by the opinion's own standard, cannot establish the ultimate fact necessary for recovery by the plaintiff, as stated by

the opinion, itself—the witnessing of the "operating cause".

The concept of an eyewitness to the "dying" also must be read in connection with the language found in the clause, "except the member himself". When so read, we create the fantastic thought that a person is an "eyewitness" to his own death. A construction of language which leads to such a fantastic concept is not in accord with that adopted by normal men.

The idea of a contract requiring recovery to be based, even optionally, upon a person witnessing death, is so morbid that it likewise creates a thought not found in the minds of normal persons.

(3).

Therefore, the ambiguity is based upon an unusual and fantastic construction of language. But, the law of Indiana requires, *even in the case of insurance companies,* that language in an insurance contract must be construed by giving to words their "popular and usual significance". It also declares that liability cannot arise "by imputing an unusual meaning to the language used in an insurance contract".

Shedd v. *Automobile Ins. Co., etc.,* 1935, 208 Ind. 621, pp. 628-629 (Discussion of Sylli. 5 and 6-8);

Auto Underwriters v. *Camp,* 1940, 217 Ind. 328, 342 (Discussion of Syll. 10) also 347 (Discussion of syll. 12).

Since the case of *Lewis* v. *Brotherhood,* 1907, 194 Mass. 1, *supra,* no case in thirty-five years, except the instant case, has thought that there was an ambiguity in the language of this clause or similar clauses of other fraternal benefit associations. The "operating cause" construction in all of the other cases in the United States has led to the logical conclusion that an eyewitness who came upon a man dead,

surrounded by a gun with cleaning materials, had not witnessed an *operating* cause, but an *operated* cause; that is, an effect, and that therefore, such a witness did not comply with the provisions of the clause and entitle the beneficiary under the policy of such a decedent to a recovery under the clause (See *Werner* case and *Roeh* case, III A (3), this subdivision of this petition).

Therefore, except for the declared ambiguity, the witness, Reese Young, who saw no more than the witness did in the *Werner* case and the *Roeh* case, would not be an eyewitness of any facts which would permit a recovery under this clause now in question.

However, the alleged ambiguity declared in this opinion, that there may be an eyewitness to the "dying", makes it possible under this opinion for Reese Young to qualify as an eyewitness, upon which recovery can be based; but since the alleged ambiguity rests upon a construction of language which is contrary to the express and declared law of the Supreme Court of Indiana (Sub-point immediately supra), the alleged ambiguity does not arise under the law of Indiana, or is invalid under the law of Indiana. Therefore, the recovery allowed in this case upon the testimony of Reese Young is contrary to the law of Indiana, and the Circuit Court of Appeals in this case has allowed a recovery which is contrary to the declared law of the State of Indiana.

C.

The record, if reviewed, will permit this Court to declare the power of a Federal court to take judicial notice of the laws of all the States in the light of *Erie R. R.* v. *Tompkins*, 1938, 304 U. S. 64.

(1).

The plaintiff-respondent raised in the District Court, by her objections to the introduction of some of the stipulated

evidence (R. 16, bottom of p. to top p. 17, also pp. 18-19), and by her briefs, the question of the power of the District Court of the United States sitting in Indiana, to take judicial notice of the laws of Ohio, when the petitioner-defendant failed to prove those laws under the provisions of the Indiana law with reference to proof of foreign laws. The District Judge overruled the objection, and, in effect, held that it was not necessary, but he wrote no opinion.

The Court of Appeals disposed of the issue in the following language:

> "We lay to one side the question of the validity of the amendment to the constitution and proceed to a determination of whether under the undisputed facts in this case there was an eyewitness within the meaning of the amendment."
> (R. 63, 1st full rhet. par.)

Therefore, the question has not been decided by any opinion of either of the courts below.

(2).

The reference to the record and the authorities which need be cited in order to show how this question arises are too involved to permit their being presented in a concise manner in this part of the petition. However, we have presented them in the brief at pages 49 to 52.

(3).

We admit that the question was decided in favor of the petitioner by the District Court, but it is a question which apparently is beginning to bother the bench and bar of the Federal courts, and we respectfully request the court to grant this petition for the purpose of settling this question before some other litigant, less able to finance an appeal, loses his rights in some District Court of the United States

through a misapprehension of what the law is upon this question.

The petitioner's counsel do not believe that the power to take judicial notice of the laws of all the States has been lost; but if it has been, it is easy enough for a party forewarned to make proof of the law of a State, other than that in which the court is sitting, if he is apprized of the necessity of doing so before he begins the trial of his case in Federal court. Certainly, impecunious litigants will be benefited and protected against any misunderstanding as to the law on this question, if this Court will exercise the writ to declare the law upon that question, as well as the other questions presented in this petition.

Part IV.

Reasons Relied On for the Allowance of the Writ.

Preliminary Statement.

The reasons for granting the writ are closely connected with the Questions Presented. Therefore, in the Brief, we shall enlarge upon the following reasons, as well as upon the Questions Presented. The petitioner respectfully requests the Honorable Justices to consider the Brief in connection with this part of the petition for the writ.

A.

The opinion, insofar as it arrives at the ultimate fact that Mrs. McGowan was an eyewitness to the "operating cause" of the death of the respondent-plaintiff's decedent (R. 72, last par. and 73, 1st par.) is sustained by reasoning processes which are illogical and not "in accordance with correct and common modes of reasoning", and to that extent it is contrary to the local law of Indiana. (See authorities under III A (2), p. 11, this petition.)

It should be remembered that the primary facts are stipulated. Therefore, this petitioner is not asking for a review of a question of fact. When the facts are undisputed or stipulated, the process of inferring the presence of an ultimate fact from primary facts requires the drawing of an inference which is valid as a logical inference. This process involves a question of law in Indiana, as well as in every other known jurisdiction where Anglo-Saxon jurisprudence is accepted as the jurisprudence of the State.

(1).

This Court, even before *Erie R. R.* v. *Tompkins,* has granted the petition for the writ, where a decision and opinion of the United States Circuit Court of Appeals for the Seventh Circuit presented conflict between the law of Indiana as declared by the Federal court and the law as declared by the Supreme Court of Indiana.

Forsythe v. *City of Hammond,* 166 U. S. 506, 41 L. Ed. 1095, 17 S. C. R. 665.

(2).

It is submitted, that when this Court, through *Erie R. R.* v. *Tompkins,* directed the Federal courts to follow the laws of the various States, this Court inferentially assumed a burden to grant relief to litigants, where a Federal court, exercising intermediate appellate jurisdiction, has erred in determining the law arising out of a factual situation, which has not been ruled upon by the State court, but which ruling upon the new factual situation violates established general rules of law of the State involved.

Is it not persuasive, also, that the Supreme Court of Indiana has declared, upon the question of ultimate review, that under the Constitution of Indiana, it possesses not only the power, but is burdened with the duty to review all deci-

sions of the Appellate Court of Indiana, in which the charge is made that the Appellate Court *has violated a ruling precedent of the Supreme Court* or has decided a new question erroneously, notwithstanding a legislative enactment denying the Supreme Court the right.

Warren v. *Indianapolis Telephone Co.*, 1940, 217 Ind. 93, 114.

B.

The second question and error presented involves the creation of an ambiguity out of the wording of the eyewitness clause by giving to the language of this clause a meaning which is not in conformity with its "popular and usual significance", but which imputes an "unusual meaning to the language used in an insurance contract".

Such construction of language is contrary to that permitted by the law of Indiana.

(See authorities cited, III B, p. 12, this Petition.)

(1).

No other court, to our knowledge, has ever held that this language was equivocal, or permitted the drawing of the ambiguous meaning which the court below has drawn. These contracts have been construed at least since 1907, the date of the decision in *Lewis* v. *Brotherhood, etc.*, 1904 Mass. 1, 79 N. E. 802, 804-807, *supra*, and no court has found an ambiguity therein.

(2).

Although the question of conflict of decision between United States Circuit Courts of Appeal on matters of the general law, not involving a Federal question, is no longer a persuasive ground for exercising the power to issue the writ here sought, nevertheless the fact that the opinion below, by declaring the alleged ambiguity, makes a person

who has observed the "operated" cause, the effect,—death —a qualified witness, where other cases (*Werner* v. *T. P. A.* and *Roeh* v. *Bus. Men's Assn. etc.* Part III A(3), *supra,* this Petition, p. 12), not recognizing that there is any ambiguity, have held such a person did not fulfill the obligation of the clause, because he had not witnessed the "operating" cause, should influence the court in granting the writ.

This is especially true where the Federal court is attempting to make new law for a State and in so doing, not only does not recognize existing decisions of other courts (*Werner* v. *T. P. A., Roeh* v. *Bus. Men's Ass'n, supra,* Part III, A, (3), this Petition, p. 12), which we have the right to assume the Supreme Court of Indiana would recognize, but also circumvents the effect of such decisions by means of an alleged ambiguity, which ambiguity will not stand the test laid down in the decided Indiana cases (*supra*), Part III, B, (3), this Petition, p. 14.

C.

As to both A and B, *supra,* of this Part IV of this Petition, it is not a valid answer that the Supreme Court of Indiana is not bound to follow the opinion which the petitioner seeks to have reviewed.

First, if a Federal court undertakes to decide a question of State law under *Erie R. R.* v. *Tompkins,* and decides it contrary to State law, we again submit, that by granting that right to the lower Federal courts, this Court inferentially said to all litigants: "We will police those courts and see that their opinions and decisions conform to the law of the State involved".

Second, the opinion of a court, having the dignity, the standing, and the reputation for correctness of decision enjoyed by the United States Circuit Court of Appeals for the Seventh Circuit, has such great weight that factually,

the strong probability is, that the courts of Indiana will accept that opinion on its face and will brush aside all efforts of lawyers to urge the errors inherent in it which have been pointed out in this Petition. Any lawyer who has gone through the frustrating experience of attempting to overrule a prevailing precedent based upon illogical reasoning, knows that what has been said is factually honest.

Thus, the very wrong sought to be corrected by *Erie R. R.* v. *Tompkins*, the intrusion upon litigants of the opinions of the Federal courts, which are contrary to the laws of that State, again will be fostered if opinions, such as the one involved, which are contrary to the law of a State, are permitted to stand.

Third, it will not do to say to this petitioner, "You could have stopped in the State court, you came here voluntarily, uninvited and unwanted, therefore we will grant you no relief." *Erie R. R.* v. *Tompkins* grants this litigant the right to a decision based upon the law of Indiana and limits the right to nothing more. Therefore, one who comes into a Federal court today, no longer can be charged with seeking an unconscionable advantage or with an ulterior motive. Factually, greater impartiality of juries (At the time of removal, an agreement to try by stipulation and before the court without jury is seldom, if ever in existence. It was not in this case), greater skill and impartiality of judges, easier and simpler methods of procedure, are some of the considerations which have large persuasive effect.

Can it be said that these considerations are dishonorable?

Even so, the Congress of the United States has not seen fit to further limit this petitioner's right to invoke the jurisdiction of the courts of the United States than by the present statute upon the subject, although it has the power to do so. *Gaines* v. *Fuentes*, 1876, 92 U. S. 10, 23 L. Ed. 524. Therefore, to refuse to grant the writ solely

because the petitioner exercised a right which the Congress has not seen fit to deny him, would amount to judicial legislation which this Court has zealously avoided.

As to Paragraphs Second and Third hereof, the petitioner respectfully invokes the doctrine that the factual necessities and actualities of a situation will be recognized behind the bare legal rule (that Indiana courts are not bound by the opinion in question), as that doctrine is expressed by this Court in *City of Indianapolis* v. *Chase National Bank, etc.,* 1941, — U. S. —, 86 L. Ed. p. 27, at p. 29 (headnotes 1 to 3), and in the dissenting opinion of Mr. Justice Frankfurter and the Chief Justice, in *Glasser* v. *U. S.,* — U. S. —; 62 S. C. R. 457 at 473.

D.

The effect of the opinion in question is to destroy the contract which this petitioner, a fraternal benefit association, has made with its members by the democratic process, whereby the members, themselves, in conventions attended by duly elected representatives, decide what contracts should be made, by constitutional amendments, in order to conserve its funds and to place all members on an equal footing (*U. C. T.* v. *Smith,* 1911 (C. C. A. 7), 192 Fed. 102, 102-5).

(This statement elaborated in Brief, pp. 57-61.)

The opinion, because it will be followed by many courts (see Point C, above this Part IV, of this Petition), affects, not only the amount involved, but also the assets of and the actuarial problems of this petitioner. Likewise, it will affect the assets of and the actuarial problems of similar associations having like or similar clauses in their constitutions and contracts. The actual amount of property rights involved and affected by the opinion, not only in

Indiana, but throughout the United States, far exceed the sum involved. It likewise affects the interests of the many members of this petitioner and associations similarly situated, in the assets of their associations, as well as their personal policy interests.

Because of this large public interest affected, and the large amount of property factually affected, by the opinion sought to be reviewed, this Petitioner respectfully prays that this Court issue the writ prayed.

(1).

The Petitioner knows that the considerations urged immediately above are not factually presented upon the record. However, once jurisdiction to entertain the writ is established, the question of whether a showing is made sufficient to justify the court to exercise its discretionary power to grant the petition and issue the writ is a mixed question of law and fact, lying peculiarly within the jurisdiction of this Court, not necessarily dependent upon the record as disclosed by transcript.

Therefore, the Petitioner has assumed that it is proper to support the facts hereinabove last urged by affidavits attached to this Petition and made a part hereof, solely for the purpose now herein set out.

(2).

Your Petitioner therefore respectfully says that this Petitioner had outstanding and in effect on December 31, 1941, 77,894 insurance certificates containing the clause in question, with potential death liability of $343,534,620.00, of which certificates, 2,007 were issued and outstanding to residents of the State of Indiana, as shown by the affidavit

of A. W. Franklin, Supreme Secretary, which is attached to this Petition, marked "Exhibit A," and offered as a part hereof, for the purposes last hereinabove set out.

Your Petitioner further respectfully says that the Iowa State Traveling Men's Association is a fraternal benefit association, which has in its contract of insurance a clause similar to the one construed in the opinion sought to be reviewed; that said association, on January 1, 1942, had issued and outstanding 63,842 insurance certificates or policies containing said clause, of which 1,134 were held by residents of Indiana, all as shown by the affidavit of Currie C. Chase, its Secretary-Treasurer, which is attached to this Petition, marked, "Exhibit B," and offered as a part hereof, for the last mentioned purpose hereinabove set out.

Your Petitioner further respectfully says that the Woodmen of the World Life Insurance Society is a fraternal benefit society, which has in its contract of insurance a clause similar to the one construed in the opinion sought to be reviewed; that said association, on January 1, 1942, had issued and outstanding 74,733 benefit certificates containing said clause, all as shown by the affidavit of Farrar Newberry, its Secretary, which is attached to this Petition, marked "Exhibit C," and offered as a part hereof, for the last mentioned purpose hereinabove set out.

E.

This Petitioner finally says that the question of whether or not the decision of this Court in *Erie R. R.* v. *Tompkins*, 1938, 304 U. S. 64, has destroyed the right of the courts of the United States to take judicial notice of the laws of all of the States of the United States, as first announced in *Owing* v. *Hull*, 1835, 9 Peters 607, 625, 34 S. C. R. 246, 253,

is of such importance that this Court will confer a boon upon litigants in, and the bench and bar of, the Federal courts, if it will declare the law upon the question.

The question arose in the District Court of the United States for the Southern Division of New York, *Cray McFawn & Co.* v. *Hegarty, Conroy & Co.*, 1939, 27 Fed. Supp., 93, 95, Syll. 1, aff'd Per Curiam, question not discussed, 1940, 109 F. (2) 443. It was strenuously advanced by the respondent, in both Federal courts below, that the right had been taken away, and apparently seriously considered at the oral argument in the Circuit Court of Appeals, by Lindley, District Judge.

These facts evidence the uneasiness and uncertainty of lawyers and judges over this question, which can easily cause an impecunious litigant, who cannot afford an appeal, or whose attorney is afraid to try one (incidentally most of us are scared to death of Federal courts and procedure), to lose valuable rights, if a District Court Judge holds that the right has been destroyed.

Wherefore, your Petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said United States Circuit Court of Appeals for the Seventh Circuit, had in the case numbered and entitled on its docket, No. 7785, *Nellie B. Wigginton, plaintiff-appellee,* v. *The Order of United Commercial Travelers of America, defendant-appellant,* to the end that this cause may be reviewed and determined by this Court to the extent prayed in this Petition, and as provided for by the statutes of the United States; and that the judgment herein of the said United States Circuit Court of Appeals

for the Seventh Circuit be reversed by the Court, and for such further relief as this Court may deem proper.

This —— day of May, 1942.

Respectfully submitted,

THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA,
Petitioner,

By RICHARD T. RECTOR,
of Columbus, Ohio;
E. W. DILLON,
of Columbus, Ohio;
CHARLES M. LA FOLLETTE,
of Evansville, Indiana;
HERMAN L. MCCRAY,
of Evansville, Indiana;
F. BAYARD CULLEY, JR.,
of Evansville, Indiana;
Counsel for Petitioner.

EXHIBIT A.

THE SUPREME COURT OF THE UNITED STATES
SEVENTH DISTRICT.

No. —.

THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA

v.

NELLIE B. WIGGINTON.

Affidavit.

STATE OF OHIO,
County of Franklin, ss:

A. W. Franklin being first duly sworn says that he is the Supreme Secretary of The Order of United Commercial Travelers of America; that said association indemnifies the beneficiaries of its certificate holders for death resulting from accidental means, and that the contract of insurance issued to its said certificate holders contains, among other things, the following:

> "Nor shall the Order be liable for any death benefit when the member dies as the result of injuries sustained as a result of a gun shot wound or the alleged accidental discharge of firearms where there is no eye witness except the member himself, in an amount greater than Five Hundred ($500.00) Dollars."

Affiant further says that as of December 31, 1941, there were outstanding approximately 77,894 certificates containing the above quoted eye witness provisions with a potential death liability of $343,534,620, of which 2,007 certificates were issued and outstanding to residents of the State of Indiana.

Further affiant sayeth not.

A. W. FRANKLIN.

Sworn to and subscribed before me this 29th day of April, 1942.

LLOYD WEEKS,
[SEAL.] *Notary Public, Franklin Co., O.*

My commission expires Aug. 24, 1943.

EXHIBIT B.

THE SUPREME COURT OF THE UNITED STATES
SEVENTH DISTRICT.

No. —.

THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA

v.

NELLIE B. WIGGINTON.

Affidavit.

STATE OF IOWA,
County of Polk, ss:

Currie C. Chase, being first duly sworn, says that he is the Secretary-Treasurer of the Iowa State Traveling Men's Association; that said association indemnifies the beneficiaries of its policy or certificate holders for death resulting from accidental means, and that the contract of insurance issued to its said certificate or policy holders contains, among other things, the following:

> "H. The Association shall not be liable for death, disability or specific loss in excess of one-tenth of the amounts of these by-laws provided for indemnity for death, disability or specific loss when said death, disability or specific loss arises from or is effected or aggravated by any of the following causes, conditions or acts or results therefrom, to-wit: * * * death or injuries resulting from the discharge of firearms where the member (or beneficiary in case of death of the member) is unable to prove by actual eye witness other than himself or the claimant, the nature and circumstances of the discharge of the firearms and the infliction of the injury."

Affiant further says that as of January 1st, 1942, there were outstanding approximately 63,842 certificates or policies containing the above quoted eye witness provisions, of

which approximately 1,134 were held by residents of Indiana.

Further affiant sayeth not.

CURRIE C. CHASE.

Sworn to and subscribed before me this 30 day of Apr., 1942.

EARL C. MILLS,

[SEAL.] *Notary Public, in and for Polk County, Iowa.*

My commission expires July 4, 1942.

EXHIBIT C.

IN THE SUPREME COURT OF THE UNITED STATES
UPON APPLICATION FOR WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE SEVENTH CIRCUIT.

No. —.

THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA

v.

NELLIE B. WIGGINTON.

Affidavit.

STATE OF NEBRASKA,
County of Douglas, ss:

Farrar Newberry, being first duly sworn, deposes and says that he is the Secretary of the Woodmen of the World Life Insurance Society, a fraternal benefit society incorporated under the laws of the State of Nebraska; that said Society pays double indemnities to beneficiaries of the holders of its benefit certificates for death resulting from accidental means; and that the Constitution, Laws and By-laws of said Society, which are a part of every benefit certificate

issued by it, contains among other things the following provision:

> "The Society shall not be liable for the payment of double indemnity under any beneficiary certificate providing for double indemnity in case of the death of the member by accident, where it is claimed that death resulted from accidental drowning, cutting, poisoning, hanging, inhalation of gas, discharge of firearms or shooting, unless at least one person other than the member was an eye witness of such drowning, cutting, poisoning, hanging, inhalation of gas, discharge of firearms, or shooting."

Affiant further states that as of January 1, 1942, the Woodmen of the World Life Insurance Society had outstanding Seventy-four Thousand Seven Hundred Thirty-three (74,733) benefit certificates which were subject to the above quoted eye witness provision.

FARRAR NEWBERRY,
Secretary of the Woodmen of the World Life Insurance Society.

Sworn to and subscribed before me this 30th day of April, 1942.

[SEAL.] KATHERINE V. PETERSON,
Notary Public in and for Douglas County, Nebraska.

My commission expires September 1, 1944.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1242

THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA,

Petitioner,

vs.

NELLIE B. WIGGINTON.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Harlan F. Stone, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

I.

The Opinion.

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit, which the petitioner seeks to have reviewed, is found in the record at pages 61 to 74, of the Transcript. It is reported in 126 F. (2d) 659.

II.

A Concise Statement of the Grounds Upon Which the Jurisdiction of This Court Is Invoked.

This statement is set out in the preceding petition under Point II thereof (pp. 6-8) which is hereby adopted and made a part of this brief by reference.

III.

A Concise Statement of the Case Containing All That Is Material to the Consideration of the Questions Presented.

This statement is set out in the preceding petition under Point I thereof (pp. 1-6) which is hereby adopted and made a part of this brief by reference.

IV.

A Specification of the Assigned Errors Which Are Urged.

This specification is set out in the preceding petition under Part III thereof (pp. 9-17) which is hereby adopted and made a part of this brief by reference.

V.

THE ARGUMENT.

Summary of The Argument.

A. As to Part II, B (3) and II, D (4), of the petition (pp. 7, 8)—The action of the United States Circuit Court of Appeals for the Seventh Circuit taken on April 13, 1942 (R. 75) in striking the Petitioner's Petition for rehearing and brief, which was seasonably filed below, from the files, extends the time to file this petition until three months from that date.

B. As to Part III, A, of the petition (pp. 10-12)—The opinion declares an ultimate fact to arise from the stipulated facts by mental processes which an analysis of the opinion discloses are illogical, and therefore contrary to the law of the state of Indiana.

C. As to Part III, B, of the petition (pp. 12-15)—The opinion declares an ambiguity which cannot arise by according to the language of the section its "popular and usual significance".

D. As to Part III, C, of the petition (pp. 15-17)—The Record, if reviewed, will permit this Court to declare the power of a Federal court to take judicial notice of the laws of all the states in the light of *Erie R. R. v. Tompkins*, 1938, 304 U. S. 64.

E. As to Part IV, C, of the petition (pp. 20-23)—The opinion not only is erroneous under the Indiana law, but factually it will lay down a new erroneous rule of law for Indiana, which is the prevailing law of that state.

F. As to Part IV, D, of the petition (pp. 23-24)—The opinion, unless reviewed, will destroy the contract rights, not only of this petitioner, but also of other Fraternal Benefit Associations similarly situated.

Point A.

As to Part II, B (3), and II, D (4) of the petition (pp. 7-8)—The action of the United States Circuit Court of Appeals for the Seventh Circuit taken on April 13, 1942 (R. 75), in striking the petitioner's petition for rehearing and brief, which was seasonably filed below, from the files, extends the time to file this petition until three months from that date.

There would seem little doubt that the petition for the writ is filed in time. Normally, it is not good policy to set up straw men just in order to knock them down; however, since distribution of petitions is made normally before

reply briefs can be made available, we ask the court's pardon for intruding a matter which normally should come by way of reply.

The opinion and judgment were entered on February 9, 1942 (R. 61 to 74). The petition for rehearing and brief were filed on February 20 (R. 75). This was within the fifteen days permitted by the rules of the lower court (Ruling, p. 12 of the rules of said court, effective May 31, 1941), on April 13, 1942. The petition for rehearing and brief in support thereof were ordered stricken from the files "because of the impertinent and scandalous matter contained therein". Even if this Court cannot take judicial notice of the rules of the lower court, the lower court stated the grounds for striking the petition from the files, and since it did not state that they were not filed in time, the controlling implication arises that they were seasonably filed.

A petition which is dismissed after it has been seasonably filed extends the time within which the petition for a writ of certiorari may be filed to three months from the date the petition is dismissed. *Gypsy Oil Co.* v. *Esco*, 275 U. S. 498; *N. L. R. B.* v. *MacKay*, 304 U. S. 333 (Tit. 28, Chapt. 9, Sec. 350, U. S. C. A.).

We submit that under these authorities, this petition may be filed at any time within three months from April 13, 1942. It is true that an entry striking a brief and petition from the files upon the grounds shown is not a dismissal, but the action of the court constitutes a disposition of the petition for rehearing, and any disposition of the petition, after the petition is seasonably filed, tolls the running of the statute.

To hold otherwise would destroy the rights of a litigant which would constitute additional punishment to the litigant over and above that arising out of the act of the court in striking the petition and brief from the files and would

confer a benefit upon the opposing party which is not in accord with the purpose behind the action of a court in striking pleadings from the files for the grounds stated in this case.

In other words, the action of the court is in the nature of a punishment of the litigant for the action of its counsel, in this, that the competent matter which might have persuaded the court to change its ruling is not considered, because of the "scandalous and impertinent matter" which was contained within the pleading. A court takes action such as it did in this case to preserve its dignity and its records. The litigant is made to suffer by being denied any consideration of competent or persuasive matter likewise found in the pleading. It would be inconsistent with the policy of the law to say that the striking of a pleading upon the grounds stated in this order did not constitute "a disposition of the pleading", and that it would have the effect of further depriving a litigant of his rights, since this would be a further and unnecessary punishment beyond that effected by the order, namely, the denial of a right to have the material matter in his pleading considered.

Also, courts of last resort have always been zealous in protecting litigants from being deprived of rights to appeal to them which are conferred by statute. Were this Court to hold that the act of a lower court in striking a pleading from the file did not toll the operation of a statutory jurisdictional provision as to time, then a lower court could deprive a litigant of the right to a statutory provision in any case by simply withholding its ruling until the statutory time had expired. No charge is made that any court would do it, but it is the policy of the law to prevent the possibility of such action being taken.

It is therefore submitted that the action of the lower court, taken on April 13th, 1942, was simply an order disposing of a petition for rehearing seasonably filed, and that,

as such, the operation of the jurisdictional statute involved was tolled from February 9, 1942, until the date upon which disposition was made, to-wit, April 13, 1942.

POINT B.

As to Prat III, A, of the Petition (pp. 10-12)—The opinion declares an ultimate fact to arise from the stipulated facts by mental processes which an analysis of the opinion discloses are illogical, and therefore contrary to the law of the State of Indiana.

The objection to the opinion under this point addresses itself to the fact that after the opinion properly analyzed the meaning of the clause of the contract in question and defined it in the term of the "operating cause" construction, then the factual analysis supplies a witness to the operating cause by reasoning which, on its face, is illogical, and therefore contrary to the law of the State of Indiana, as expressed by its highest court.

The leading case construing the meaning of an eyewitness clause—in fact the case from which every other opinion in the United States stems, is the case of *Lewis* v. *Brotherhood, etc.*, 1907, 194 Mass. 1. The opinion below quotes extensively from this case, from pages 64 to 68 of the opinion. The Massachusetts opinion permitted a recovery where two young people were observed by several witnesses, in a happy frame of mind, paddling a canoe upon a river in Massachusetts. They rounded a bend—a short time later a scream, described as a scream of fear, was heard, and, apparently not more than ten minutes after they were observed and the scream was heard from around the bend of the river, other witnesses came upon their upturned canoe, and the bodies were recovered close to the place where the upturned canoe was observed.

There was an eyewitness clause in that contract. The

Supreme Court of Massachusetts, in construing the clause, developed the theory that if enough facts were witnessed, from which a then operating cause of the accident, in that case drowning, could be legally inferred as a reasonable inference, then the clause of the contract was satisfied. Of course, *the facts must also be sufficient to furnish the inference that the operating cause* thus inferable *continued to operate until it acted.* It is to be noted that the "operating cause" in the *Lewis* case was the canoe being paddled upon the water; that is, something was being done to the canoe, and that something was observed and also, it *was reasonable to infer that that something,* the thing observed, *continued to operate until the accident which occasioned the death,* in that case the upsetting of the canoe and the drowning, *actually happened.*

In transposing by analogy the reasoning of the *Lewis* case to the actual discharge of a gun, the analogy requires that the thing *being done to the gun,* from which it may be inferred that the discharge happened, is the thing which must be observed. It is not enough for a witness, after a gun has discharged and a person has been killed, to see a gun which has been discharged, and cleaning materials around it, to satisfy the "operating cause" theory. *Werner* v. *T. P. A.* (1929) (C. Tex.) 31 F. (2) 803, 803-804, 1930 aff'd (C. C. A. 5) 37 F. (2) 96, 97; *Roeh* v. *Bus. Men's Ass'n, etc.* (1914), 164 Ia. 199, 145 N. W. 479, 480-482. The reasoning is obvious. Such a witness as involved in the last two cases sees the effect of some "operating cause" which he did not see. He sees an "operated cause", whose nature is unknown; but he does not see things, facts, in action prior to the time the gun discharged, from which he may infer the effect. A person who sees things or facts in action, sees the cause of a subsequent effect, the discharge of a gun—such a person sees the "operating cause". What he must see in order to satisfy the "operating cause" construc-

tion of these contracts is *the thing being done to or done with the gun,* from which it is reasonable to infer that the thing observed continued in action until it served as an "operating cause" of the discharge of the gun. The cases which support this analysis are as follows:

Pride v. *Interstate Bus. Men's Acc. Ass'n., etc.,* 1927, 207 Ia. 167, 216 N. W. 62, at 65;

Wild v. *Sovereign Camp,* 1933, (La. App.) 149 So. 906, at 908;

Villamarette v. *Sovereign Camp, etc.,* 1938, (La. App.) 178 So. 648, at 651.

(Note: The Southern Reporter is the official reporter of La. App. cases.)

Peculiarly, the court below, very clearly, analyzed the contract and came to the correct conclusion as to its meaning, which we have hereinabove set out. Its words are as follows:

> "What is the operating cause in the case at bar? In the Lewis case it was the tricky canoe *being paddled in the river.* In the case at bar, it was a loaded shotgun *in the process of being cleaned.* In the instant case, it is the situation in which there is the ever-present danger of a gunshot wound. This situation was observed by Mrs. McGowan as she left the office an hour before the discharge of the gun."
>
> (R. 72.) (The italics are ours.)

While it is true that in most of the decided cases, the thing being done to the gun, the cleaning of it, in the *Wild* and *Villamarette* cases, *supra,* the use of it in a search for intruders, the *Pride* case, *supra,* was followed very shortly by the discharge of the gun, so that the continuing in existence of the thing observed until the gun discharged is a very reasonable inference.

The opinion in the instant case says:

> "We attach no significance to the fact that an hour or more of time elapsed between the time Mrs. McGowan *saw the deceased in the act of cleaning the gun* and his injuries,"
>
> (R. 72.) (The italics are ours.)

The opinion also says:

> "We have found no authority in which the lapse of time between the time the operating cause was observed and the happening of the event causing death was held to be material."
>
> (R. 73.)

We do not quarrel with these statements of the lower court. We would not be here if this was all that the factual situation showed. In other words, we recognize that in determining how long a time may elapse between the observance of an "operating cause" capable of causing the discharge of a gun, and the time of its discharge, involves the determination of a question of fact, a question of ultimate fact, upon which the minds of reasonable men may differ. We would not be appealing a question of fact, unless the time elapsed was so great as to disclose that the reasoning was not "in accordance with correct and common modes of reasoning," that is, a half day or a day elapsed between the observation of the operating cause and the known time of the discharge of a gun. We are not asking this Court to say that the elapsed time of one hour converts a question of fact into a question of law under the above standard of law laid down, because it is unreasonable.

However, the opinion does say this:

> "This situation (the cleaning of a loaded shotgun) was observed by Mrs. McGowan as she left the office * * *. We attach no significance to the fact * * * and the fact that during this space of time *the deceased*

> *had left his office for several minutes,* as the deceased *was found in the same situation with relation to the operating cause as Mrs. McGowan observed him to be in when she left the office.*" (R. 72.) (The italics are ours.)

This is the part of the opinion which we positively declare constitutes an illogical analysis of the facts, under the operating cause theory, and which is not "in accordance with correct and common modes of reasoning."

The record discloses that the deceased was last seen in the process of cleaning his gun by Mrs. McGowan at 12:15 P. M. He was taken by an elevator from his floor in the office building to the street at 12:45, and did not return to his office until about ten minutes before his death. Reese Young, who saw Wigginton a few seconds after the discharge of the gun, fixes this time as between 1:15 and 1:30 o'clock. Therefore Wigginton returned to his office between 1:05 and 1:20, and he was gone out on the streets of the city of Evansville, either from 12:45 to 1:05, twenty minutes, or from 12:45 to 1:20, thirty-five minutes. He was seen by no one after he entered his office, at either 1:05 or 1:20, until Reese Young found him dead, or dying (R. 26 to 27, Stip. of Facts #13).

We declare first, that, applying "correct and common modes of reasoning" to these facts, it cannot possibly be said that the possible operating cause, *the process of cleaning the gun, which Mrs. McGowan saw at 12:15, continued in operation* as a potential operating cause *until it acted* to produce the deceased's death, because the facts affirmatively deny this and show that the operating cause which Mrs. McGowan observed was terminated and abandoned by the deceased, to the positive knowledge of at least two people for a period of between twenty and thirty-five minutes. Therefore, an essential element of the "operating cause" construction of this contract, namely, that it can be

inferred from the facts that the *cause observed* continued in operation without interruption until it acted, is positively absent from the facts in this case, because we need not infer —we actually know from the stipulated facts—that the cause observed was abandoned by the deceased for from twenty to thirty-five minutes. Therefore, it ceased to act, and what Mrs. McGowan saw could not possibly have been the "operating cause" of the deceased's death.

No one knows, and there are no facts from which any person can infer, except by resort to speculation and conjecture, that Wigginton ever again started the process of cleaning the gun after he returned to his office, because no one saw him for the ten minutes that elapsed between the time of his return to his office and the time he was found dead or dying. Therefore, the opinion is in error when it states that, "the deceased was found in the same situation with relation to the operating cause as Mrs. McGowan observed him to be in when she left the office". This is true because the Werner case and the Roeh case, *supra*, distinctly disclose that the mere finding of a man dead or dying, surrounded by a firearm and cleaning materials does not throw any light on the "operating cause", that is, what he was doing with the gun to cause it to go off. Such evidence, and this is all that Reese Young saw, merely discloses that some cause has operated and produced an effect, but it constitutes no evidence of what that operating cause was.

It is true that, reasoning from effect to cause, two equally reasonable ultimate facts may be inferred; that is, suicide or accidental discharge of the gun which was found. But, by contract, the parties here have stated that this method of determining a right of recovery is eliminated by the eye-witness clause. This opinion, itself, says the same thing (R. 71, last par. on page). The parties, by contract, require that the operating cause, the facts from which the

operating cause may be reasonably inferred, all must be observed as a then present, potential cause, in order to afford recovery. The parties under the law of Indiana are entitled to their contract.

It is contrary to the law of Indiana to give a party a recovery where the facts are not sufficient to comply with the terms of the contract to entitle them to a recovery, without regard to whether any court or any individual believes that the contract should not be as it is or that it should be stricken down. The striking down of such a contract is the province of the legislature of the State of Indiana, and not of any court.

> "Mere surmises, guesses or conjectures of the jury can lend no support to their verdicts. In Babcock *v.* Pittsburgh R. R. Co., 140 N. Y. 308, it is said, '*Verdicts must stand upon evidence* and not upon conjecture, however plausible, *and if the situation be such that the plaintiff cannot furnish the evidence, the misfortune is his.*'" (The italics are ours.)
>
> *Cleveland, etc., R. R. Co.* v. *Miller,* 1897, 149 Ind. 491, 508.

> "An inference of fact in the instant case upon which to base negligence of the appellant in respect to the loose object on the floor would have to rest upon conjecture, guesswork or speculation, upon which verdicts cannot properly be based."
>
> *J. C. Penny, Inc.* v. *Kellermeyer,* 1939 (Transfer Den. 1939), 107 Ind. App. 253, 264.

It sometimes happens that an intermediate court states the same rule of law in clearer language than a court of last resort. For that reason, we offer the following citation:

> "We are not unmindful of the settled rule that, in determining what has been established by the evidence, courts and juries may consider not only the facts directly proved, but also *all reasonable inferences that*

may be properly drawn therefrom. However, this rule cannot be applied arbitrarily but judgment must be exercised in so doing, *in accordance with correct and common modes of reasoning.''*

Russell v. *Scharfe,* 1921, 76 Ind. App. 191, at p. 197.

We have established that the conclusion which the court below reached, as shown in its opinion, that Mildred McGowan was an eyewitness to the operating cause of the respondent-plaintiff's decedent's death is not logically tenable, when judged ''in accordance with correct and common modes of reasoning,'' that it grants a recovery in a situation where ''the plaintiff cannot furnish the evidence''. Therefore, the opinion is contrary to the expressed law of the State of Indiana in existence at the time the opinion and decision in this case were made.

POINT C.

As to Part III, B, of the Petition (pp. 12-15)—The opinion declares an ambiguity which cannot arise by according to the language of the section its ''popular and usual significance.''

The opinion declares, for the first time that we can discover in thirty-five years, that there is an ambiguity in the language involved. The courts have uniformly held that there must be an eyewitness to the discharge of the firearm, as that language is understood in light of the liberalizing construction of the operating cause theory, which we have just discussed, but this opinion says that this language is ambiguous, and that it will permit a recovery where there is an eyewitness to the dying. As we will point out, the effect of such a construction is to destroy, for all practical purposes, the contract rights of this petitioner as contained in its more than seventy-seven thousand contracts in effect throughout the United States.

The language of the opinion involved reads as follows:

> "Furthermore, we think the provision of the constitution of the appellant order under consideration in this case is ambiguous. It provides that there must be an eyewitness. Witness to what? The dying or the shooting? Surely, it cannot be said that this provision is clear as to which one is meant. We are unable to determine from a reading of the provision which one is meant. Contracts of insurance are construed most strongly against the insurance company, and so as to give protection to the insured if this can reasonably be done. Masonic Acc. Ins. Co. *v.* Jackson, 200 Ind. 472, 164 N. E. 628.
>
> "In the case at bar, there was an eyewitness to the death of the insured. Mr. Young was upon the scene within twelve seconds. It is a fair inference, which we are authorized in this case to draw, that Young saw Wigginton dying. It is reasonable to construe the policy, which is ambiguous, so as to mean that there shall be an eyewitness to the 'dying.' We so construe it. Young was the eyewitness to the dying. Therefore, the requirements of the policy were met."
>
> (R. bottom p. 73 to end of opinion, p. 74.)

The opinion states its own ambiguity. It states two constructions. It is elementary that if there are two constructions, each of them must be such as accord to the language of the clause its "popular and usual significance." Furthermore, it cannot arise by imputing to the language "an unusual meaning to the language used in an insurance contract." Therefore, in order for the alternative construction that the clause will be satisfied by an eyewitness to the dying, to be legally a recognizably ambiguous construction, it must be one which will stand the test of the above quoted language taken from the case of *Shedd* v. *Automobile Ins., etc.*, 1935, 208 Ind. 621, pp. 628-629.

In making this test, it is proper to consider whether the alternative meaning is consistent with the declared purpose

of the clause and the existing construction of the clause. The opinion, itself, declares the purpose as being a clause intended "to avoid the presumption indulged in by courts and supposed to arise from the natural love of life and the instincts of self-preservation, used by the courts to meet the defense of suicide, and to require the event to be taken from the solitude sought by suicides." (R. 71, last rhet. par.)

Actually, it is a little more than that, in that, when the petitioner makes a tender of $500.00 under this clause, or when it pleads the clause, it eliminates, entirely, and deprives itself of the right to rely upon the defense of suicide. This is true because the relinquishment of this right is the consideration which supports its right to pay $500.00 in any event where there is no eyewitness. And it is further true because the clause speaks of "the alleged accidental discharge of firearms" so that when $500.00 is tendered, or a liability of $500.00 is admitted by pleading the clause, the accidental nature of the discharge is admitted, and the petitioner says: "We are only liable to pay $500.00 to you because there is no eyewitness to the operating cause of this discharge." It was because of this analysis of the meaning of the contract that the petitioner in this case withdrew its defense of suicide before going to trial, since it had both tendered $500.00 before trial and also pleaded the clause in question. This being true, any construction which would be reasonable must be one which is in accordance with the intent and purpose of the clause. But, we ask you, "What possible light upon the operating cause of the discharge of a firearm can a person throw, who sees the dying of another?" (See *Werner* and *Roch* cases, *supra,* and our analysis of this proposition under our argument under Point B.)

Furthermore, we ask you, in the exercise of the common capacity of men to reason, what possible information or knowledge can a person have who comes upon another who

is dying as the result of the discharge of a firearm, who only sees the result of some unknown operating cause, unless his testimony would be the basis to combat a defense of suicide by showing that the body, surrounded by a firearm and cleaning materials, would lead to an equally reasonable inference that the gun must have been accidentally discharged? However, since the defense of suicide is not in issue, then the proposition that an accidental cause might be inferred as equally reasonable as that of suicide, is evidence which is not material to the issue arising between the parties or upon the pleadings under this contract as construed by the lower court, itself.

Is not an alleged ambiguous meaning, which has no significance and would furnish no evidence upon the issue, presented by the contract, a useless meaning, an unreasonable meaning, and a purposeless meaning?

If this is true, there is no ambiguity, because the alleged ambiguity is meaningless.

Furthermore, the clause says that there must be an eyewitness to the discharge of the gun "except the member himself." The alleged ambiguous meaning must be tested by reading it into the contract, with all of the language in the contract as it is found. In other words, we certainly cannot create an ambiguity by striking out any of the language of the contract which would make the ambiguous construction appear fantastic or incongruous. But if you read the ambiguity assigned to this clause in connection with all of the language in it, you reach this following meaning: "There can be no recovery unless there is an eyewitness to the dying *except the member himself.*" This alleged ambiguity then, of course, says, and irrefutably infers, that a person is an eyewitness to his own dying. But the Supreme Court of Indiana says that "you cannot assign unusual significance or meaning to the language of an insurance contract," in order to create liability, and it says that language

must be understood in its "usual and popular significance."

Are lawyers and judges so removed from the ordinary, common man—do they live in such a rarefied atmosphere of language and thought—that they believe that the common man who understands and uses language in its "popular and usual significance," ever thinks of himself as being "an eyewitness" to his own death or dying?

An Edgar Allan Poe or a Coleridge, hopped up with dope, or even an Oscar Wilde, after a period of dissolute roistering, might possibly conceive of themselves as being an eyewitness to their dying, but the thought is certainly incomprehensible to those of us who are normal people, and lead normal lives, who enter into normal contracts and who use language in its "popular and usual significance." It is such people that the law is designed to serve, and it is the thoughts of such people which furnish the standards which courts read into language. We submit that the alleged ambiguity leads to such a fantastic concept that its invalidity is apparent upon its face.

Finally, we think this court will take judicial notice of the fact that the members of an organization, known as The Order of United Commercial Travelers, has among its membership normal middle-class people. Such people seldom put a premium upon stressing death. Such people seldom have morbid thoughts. Yet, the concept of creating liability under a policy of insurance by making the stressing of death a prerequisite to recovery is certainly a morbid one. It is not a thought which is in the mind of the average, common man. It is not a thought which arises by giving to words their "popular and usual significance."

Again, an ambiguity which embodies within its words the concept of morbidity is not one which recommends itself to courts, judging language by the standards of the normal man, as being a valid construction.

The Supreme Court of Indiana has condemned the construction of a contract, in order to create liability against an insurance company, in an unusual or peculiar manner within a very recent period of time. We quote:

> "This clause was part of the contract of insurance or indemnity; it is not ambiguous, and the contract as a whole must be construed as any other contract, and the language is to be accorded its popular and usual significance.
>
> 'It is not permissible to impute an unusual meaning to language used in an insurance contract.'
>
> *Hoosier Mutual Automobile Insurance Company* v. *Lanam* (1923), 79 Ind. App. 629, 632, 137 N. E. 626.

> "It is generally held that, if the language used in an insurance policy is ambiguous, or admits of two constructions, it will be construed in favor of the insured as against the insurer in such a way as to protect the interest of the insured who has paid a consideration for the indemnity. Hoosier Mutual Automobile Ins. Co. *v.* Lanam, supra; Federal Life Insurance Company *v.* Kerr (1910), 173 Ind. 613, 89 N. E. 398, 91 N. E. 230, 42 C. J. 790, sec. 356. However, in the absence of ambiguity in an insurance contract, neither party can be favored in its construction; and, where a contract of insurance contains mutual stipulations, each is to be construed favorable to the party entitled to claim its benefit. 32 C. J. 1152, secs. 254, 265."
>
> *Shedd* v. *Automobile Ins. Co., etc.* 1935, 208 Ind. 621 at pp. 628-629.

Also, *Automobile Underwriters, Inc.* v. *Camp*, 1940, 217 Ind. 328, at p. 342, where the following language is found:

> "Courts are not at liberty to make contracts for individuals. They have a right to make such contracts as in their judgment are proper. It may be unfortunate in this case that Mr. Summers did not carry insurance

that would protect occupants of his automobile, but that fact does not change the terms of the policy. For the errors mentioned, the cause is reversed with instruction to sustain appellant's motion for a new trial."

Therefore, the opinion violates the declared law of the State of Indiana, in that it creates an ambiguity by the unusual, fantastic use of language, which is contrary to the declared law of the State of Indiana. It follows that the alleged ambiguity read into this contract is not an ambiguity which can be permitted to stand, under the law of the State of Indiana. To permit it to stand is to destroy the effect of *Erie R. R.* v. *Tompkins*, and thrust upon the courts of Indiana, and the citizens of Indiana, a declaration of Federal law which is contrary to that of the State of Indiana.

It must be remembered, further, that, without this alleged ambiguity, Reese Young is not a witness of any fact which will permit a recovery under the "operating cause" construction of this contract. (*Werner* case, *Roch* case, repeatedly cited *supra.*) Therefore, the decision and opinion of the lower court is contrary to law, because it permits a recovery upon a construction of a contract which is not permitted under the laws of the State of Indiana.

POINT D.

As to Part III, C, of the petition (pp. 15-16)—The record, if reviewed, will permit this Court to declare the power of a Federal court to take judicial notice of the laws of all the States in the light of *Erie R. R.* v. *Tompkins*, 1938, 304 U. S. 64.

(1).

The opinion says:

"We lay to one side the question of the validity of the amendment to the constitution and proceed to a

determination of whether under the undisputed facts in this case there was an eyewitness within the meaning of the amendment."

(R. 63, 1st full rhet. par.)

(2).

The "eyewitness" clause amendment, limiting the liability under the contract was adopted and became effective in 1931 (R. 24-25, Stip. of Facts #7), some twenty-five years after the respondent-plaintiff's decedent became an insured member (R. 22-24, Stip. of Facts #3 to 6).

(3).

Notwithstanding the fact that the application for membership, (R. 22, Stip. of Facts #3), and the Class A Insurance Certificate (R. 23, Stip. of Facts #5) contain language which make the subsequent limitation of liability, the eyewitness clause, binding upon the plaintiff and her decedent under the law of Ohio:

The Ohio Gen'l Code, 1930, Sec. 9467 and Sec. 9469, passed 1904;

1905, *Tisch* v. *Protective Home Circle,* 72 Oh. St. 233, 74 N. E. 188, 188 to 192;

1935, *Van De Water* v. *U. C. T.* (C. C. A. 2) 77 F. (2) 331, 333;

The amendment might not have been binding on them in Indiana.

1908, *Court of Honor* v. *Hutchins,* 43 Ind. App. 321, 324 (R. Den. 1909);

1911, *Court of Honor* v. *Rausch,* 50 Ind. App. 161 (R. Den. 1912).

(4).

But the Supreme Court of Indiana has held that the validity of the Constitution of a foreign fraternal benefit

association and of its power to amend the same so as to bind its members holding insurance contracts are solely governed by the law of its state of incorporation, here Ohio, and that the courts of Indiana will bow to the laws of the state of incorporation upon these subjects.

1914, *Supreme Council, etc.* v. *Logsdon,* 183 Ind. 183, Sylli. 1 and 2, pp. 183, 187-190;

1914, *T. P. A.* v. *Smith,* 183 Ind. 59, Syll. 1, p. 59, Syll. 4, pp. 59-60, Syll. 5, pp. 60, 68, 74-80;

1905, *Garrique* v. *Kellar,* 164 Ind. 676, 681, 683.

Under *Erie Railroad* v. *Tompkins,* 384 U. S. 64, the Federal courts were bound to follow the last cited cases and hold that if the amendment was valid in Ohio, it was binding upon the plaintiff in Indiana, notwithstanding the two *Court of Honor* cases in Indiana.

(5).

The petitioner-defendant did not prove the law of the State of Ohio in the Federal courts, as required by the Indiana, "Uniform Judicial Notice of Foreign Law Act" (Acts Ind. Gen'l Ass. 1937, Ch. 124, Sec. 1 to 7, p. 703) Burns, 1933 Stat. Ann. (Dec. 1941, Cum. Pack. Supp.) 2-4801 to 2-4807.

(6).

Thereupon the respondent-defendant contended in the District Court and in the Circuit Court of Appeals that since *Erie R. R.* v. *Tompkins,* 1938, 304 U. S. 64, the District Courts no longer had the power to take judicial notice of the law of a State, other than that in which they sat, but that the laws of such State had to be proved in the manner required by the law of the State in which the District Court sat, notwithstanding *Owing* v. *Hull,* 1835, 9 Peters 607, 625, 34 S. C. R. 246, 253.

The question is presented by the objection of the respondent-plaintiff to the introduction into evidence of the eyewitness clause amendment (R. bottom of p. 16 to top of p. 17, also bottom p. 18 to middle p. 19) upon the grounds, among others, that "it impairs the obligations of the contract * * *; that it destroys vested rights of the decedent * * *."

The District Court gave no written opinion, although it did overrule the objection (R. 17, middle of page, also p. 19, middle of page).

The Circuit Court of Appeals' action is hereinabove set out under this Point II, C, (1).

(7).

The question arose, not only in this case, but also in *Cray, McFawn & Co.* v. *Hegarty, et al.* (Dist. Ct. So. Div. N. Y. 1939) 27 Fed. Supp. 93, 95, Syll. 1, Aff'd, Per Curiam 1940, without reference to the question, 109 F. (2) 443, where the power to take judicial notice was confirmed, notwithstanding *Erie R. R.* v. *Tompkins,* 1938, 304 U. S. 64.

Since the latter opinion, two Federal courts have stated their power to take judicial notice, but the question apparently was not raised.

Eastman etc. v. *Warren* (C. C. A. 5, 1940) 109 F. (2) 193;

George v. *Stanfield* (D. C. Ida. S. D. 1940) 33 Fed. Supp. 486.

(8).

The fact that the question is arising indicates a need of the Federal bench and bar to be advised and set at rest upon this question by the Honorable Justices of this Court.

Point E.

As to Part IV, C, of the Petition (pp. 20-23)—The opinion not only is erroneous under the Indiana law, but factually

it will lay down a new erroneous rule of law for Indiana, which is the prevailing law of that State.

The petitioner asks this Court to grant the petition and issue the writ for the reason that, although technically, the opinion and decision of the United States Circuit Court of Appeals for the Seventh Circuit is not binding upon the courts of Indiana, factually, and for all practical purposes, it will have that effect. This is true, because a court occupying the position in the Federal court system, the dignity and the reputation for correct decision which the court in question occupies, when it renders a decision and writes an opinion, exercises great and almost controlling persuasive effect upon the courts of last resort within its jurisdiction. Therefore, great care should be taken to be sure that an opinion of such a court correctly states the law of the State, whose law is being interpreted. If this care is not taken, all of the benefit sought to be conferred upon litigants by *Erie R. R.* v. *Tompkins* will be destroyed.

The purpose of *Erie R. R.* v. *Tompkins* was to strike down inequalities between litigants subject to the jurisdiction of the laws of any State of the union. (In this connection, this petitioner, by doing business in Indiana, submits itself to the jurisdiction of the courts of that State. We need not cite the statutory provision because the "Stipulation with Reference to Record on Appeal" (R. 6 to 7) discloses that the Superior Court of Vanderburgh County originally had jurisdiction of the petitioner, and that the petitioner was duly served with summons issued out of that court. This could not be true if it were not subject to the jurisdiction of the courts of Indiana.)

Therefore, this petitioner-defendant, as well as the respondent-plaintiff, had the right to have this case decided in the Federal courts under the law of the State of Indiana. Since *Erie R. R.* v. *Tompkins,* it can be charged with no ulterior motive in going into the Federal court and we have

pointed out in the petition, *supra*, pp. 20-22, that there are many honest reasons which motivate a non-resident in removing a case to the Federal court. Therefore, this petitioner is entitled to stand before this Court and assert its right to have this case decided under the laws of the State of Indiana. More than that, however, it is entitled to ask this Court to see to it that the lower Federal courts conform to the law of Indiana and declare it properly; because factually, their decisions now are bound to have great persuasive and factual effect in controlling the subsequent opinions of the courts of last resort of each State in the Union.

This is true because, in theory at least, since *Erie R. R.* v. *Tompkins*, a court of the United States actually declares the law of a State when it renders an opinion involving State questions. We therefore respectfully urge this Court to issue the writ in this case in order to assert to all litigants of every State in the Union that it will police the Federal courts and see that they actually decide cases according to State law, in compliance with the duty which *Erie R. R.* v. *Tompkins* placed upon them.

We respectfully submit that this Court, having instituted the rule that an opinion of a court of the United States must follow the state law involved, assumed thereby a burden which it cannot shirk, by denying a petition for writ of certiorari in a case like this; namely, a burden to see that the courts of the United States follow the State law, and that they not only do not violate the State law, but that they also do not set up erroneous decisions and opinions with reference to the law of a state, which are contrary to the existing law of the State, and thereby corrupt the law of a State as they find it at the time they render their decision.

If this Court does not assume the burden and responsibility which rests upon it by reason of its decision in *Erie*

R. R. v. *Tompkins,* then we will have a return of the same evil which that case sought to strike down; namely, we will have the courts of the United States misconstruing and ignoring the laws of a State upon questions involving the laws of such State, so that the United States Circuit Courts of Appeal will become the supreme court of all of the States within the jurisdiction of those courts. And gradually, we will build up a body of law for those States, dictated to those States by the Federal courts, particularly the Circuit Courts of Appeal, which domination will be much more severe than that which existed prior to *Erie R. R.* v. *Tompkins.* This is true, because prior to *Erie R. R.* v. *Tompkins,* a State court could say, with good grace, "We will ignore the opinion of the Federal court because it is declaring Federal law, and we will declare the law of the State." But today, a lawyer, citing a decision of a Circuit Court of Appeals—this decision for instance—will say to the Supreme Court of Indiana, "But you know that this is the law of Indiana, because under *Erie R. R.* v. *Tompkins,* the Circuit Court of Appeals for the Seventh Circuit had to declare the law of Indiana. The judges of that Federal court are great men, learned in the law—they are free from political influence or bias of any kind. And who are you, judges chosen by a democratic election system, fraught with political corruption, to say that you have greater legal minds than such judges? And therefore, you must accept the law that the Circuit Court of Appeals for the Seventh Circuit laid down as the law of Indiana, because of the stature, dignity, knowledge and ability of the men who cause that court to function, as its judges."

This is no idle argument. Any judge who has been a lawyer and tried cases will recognize that this argument, couched possibly in more diplomatic language, will be

thrown at every supreme court of every State within the jurisdiction of every United States Circuit Court of Appeals, from now on, upon every question involving the laws of every State of the Union. Thus, there will grow up a domination of the States by the Federal judiciary, which will be far worse in its effect, and more iron-clad in its control over the rights of the litigants of every State in the Union than that which this Court sought to strike down in *Erie R. R.* v. *Tompkins.*

We, therefore, respectfully, but earnestly, submit that if this Court denies the petition for the writ in this case, where the law of the State of Indiana is so openly disregarded, it will be tantamount to a failure to assume the responsibility which this Court voluntarily created and inferentially assumed by the doctrine announced in that case.

The petitioner's counsel heartily endorse the concept set out in *City of Indianapolis* v. *Chase National Bank, etc.*, 1941, — U. S. —, 86 L. Ed. p. 27, at p. 29 (headnotes 1 to 3), and in the dissenting opinion of Mr. Justice Frankfurter and the Chief Justice in *Glasser* v. *U. S.*, — U. S. —, 62 S. C. R., 457, at 473; namely, that the Supreme Court of the United States, in declaring its decisions will look behind the legal technicalities to the substance of the issues involved and will decide the case in order to dispose of the substantial, factual considerations actually present. It is true that the principle was not declared upon a set of facts similar to that presented by this record, but it is also true that a declaration of principle, once declared, should be applied to every new factual situation and the implications of that application to the new factual situation followed to their logical conclusion, and the result accepted without regard to the position of the litigant asserting them. In other words, if the principle is sound, and it is, this fraternal benefit association has as much right to invoke

it under the Anglo-Saxon concept of jurisprudence as a city seeking relief from a public utility, or the United States of America in a criminal case. We will lose the most precious thing in our law, if we develop the habit of differentiating between parties who are entitled to invoke the law, or if we limit the right to invoke the law to any particular class of persons and deny it to another class. The sins of unequal application of the law to parties, of the last half century, are no justification for perpetuating them in this day, just because the character of the person sinned against, or his economic position may now be the reverse of what it was then.

POINT F.

As to Part IV, D, of the Petition (pp. 22-24)—The opinion, unless reviewed, will destroy the contract rights, not only of this Petitioner, but also of other Fraternal Benefit Associations similarly situated.

The petitioner further asks this Court to grant the petition and issue the writ because the question here involved is of importance to a large group of our society and involves contract rights of many fraternal benefit associations and their members. It also involves the interest of the many members of fraternal benefit associations in the assets of their associations, and presents actuarial problems much greater than appear upon the face of the opinion, not only to this petitioner, but to many other fraternal benefit associations having similar clauses in their contracts or constitutions.

The opinion in this case, particularly that part which declares that there is an ambiguity in the clause in question, effectually destroys the contract for all practical purposes. As we have stated in the Petition and Brief, this is the only case that we have found which declares that there

is the ambiguity charged in this case, in this clause, during the thirty-five years that similar clauses have been construed. To hold that the clause can be satisfied by an eyewitness to the dying is to destroy the purpose of the clause; namely, to eliminate, altogether, the question of suicide in consideration of an offer to pay $500.00, where there has been no eyewitness to the "operating cause" of the discharge of the gun. As we have previously pointed out in this brief, a person, who witnesses the dying of someone, witnesses the effect of some cause, which *has operated before he came upon the scene.* The idea that he can furnish any evidence which will throw conclusive light upon the operating cause is illogical and contrary to the "operating cause" construction of the contract. Therefore, it destroys all previous constructions of the contract and destroys the contract which the parties had a right to make. It throws back the companies to the position of asserting suicide defenses in all cases instead of permitting them to pay $500.00 where there was no eyewitness to the operating cause.

Some people may think that this is beneficial to policyholders. Evidently, this thought was subconsciously present and dominated the opinion of the Circuit Court of Appeals in question; and therefore, the opinion, some people will say, should be looked upon as one liberalizing the law for the benefit of the poor, or the needy, or the widows of the members of these fraternal benefit associations. Such thinking assumes that a certain fact is true, which assumption is not warranted by actualities. In other words, with this clause destroyed by the construction given it, no company can afford to settle cases, where there was an *eyewitness who came up after* the operating cause *had acted,* for $500.00, but it will be forced, in fairness to its membership, if it believes from investigation that the act was one

of suicide, to make that defense and to refuse to pay anything in settlement. But, not all suicide defenses are unsuccessful—a reasonable amount of them are won. Also, in order to make a suicide defense in the case of men, very often, it is the duty of the investigator for the company to *cherchez la femme*. Human nature being what it is, this search, very often, is successful, and the motive for suicide is discovered to be an illicit association with a woman, the dragging forth of which through the process of a trial is never pleasant for the plaintiff seeking to recover. Furthermore, its effect upon children of the suicide, if there are children, is likewise not conducive to the full development of their lives, human nature again being what it is, and other children being the cruelest beings in all the animal kingdom.

Therefore, we find in this case, as we find in all cases, that where decisions which men make are based upon the best of intentions, the results of decisions contrary to the law are often entirely different from those which the persons making them contemplated.

In addition, the number of these cases which arise and are settled or disposed of is not measured by the number which have gone to litigation. The provision in this contract was written into it by as democratic a process as any available to society in its present state of perfection. These associations do not act like mutual insurance companies. Fraternal benefit associations, such as your petitioner, are operated by the members, for themselves. The members, themselves, determine what shall be the provisions and conditions for payment of benefits. They determined by due democratic process that they should limit the payment of the death benefit to $500.00 in case death resulted from a gunshot where there was no eyewitness except the

member himself. It was the intention of the members that this amendment should control. A fraternal benefit association is not like a corporation where a few can control it, but each member has a vote, and in fact, has the opportunity to exercise his vote, in determining that his policy of insurance shall be limited, as this policy is limited in this case.

They have a ritual and they actually have conventions at which delegates, chosen from out of the ranks of the members, attend, and determine the rights which shall be conferred under their insurance provisions, upon themselves, as well as other members. Even if it could be said that these conventions are boss dominated, so also are political conventions, but we abide by the results thereof, and courts do not interfere, or interfere with reluctance, with the decisions of political conventions. Therefore, courts should be reluctant, by judicial decision, to strike down and destroy, by the creation of ambiguities which do not factually exist, the contract provisions, which fraternal benefit associations, by present day democratic processes, have seen fit to place in their constitutions and contracts.

We have furnished affidavits from but three of the many such associations whose contracts are virtually destroyed by the opinion in question.

It is the declared policy of this Court in recent years, by so many decisions that they need not be cited, that courts must not interfere with legislative or democratic process, but must construe rights as they find them.

It is respectfully submitted that this petitioner is as fully entitled to the benefit of that announced policy of this Court as an administrative board, a labor union, or any other litigant who may present his petition for writ of certiorari to this Court, in a case where the law of a State has been violated in a manner so clearly demonstrated as the record

in this case demonstrates the violation which this petitioner seeks to have reviewed.

Respectfully submitted,

THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA,
Petitioner,

By RICHARD T. RECTOR,
of Columbus, Ohio;
E. W. DILLON,
of Columbus, Ohio;
CHARLES M. LA FOLLETTE,
of Evansville, Indiana;
HERMAN L. MCCRAY,
of Evansville, Indiana;
F. BAYARD CULLEY, JR.,
of Evansville, Indiana,
Counsel for Petitioner.

(4)

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA,
Petitioner,
vs.
NELLIE B. WIGGINTON,
Respondent.

No. [redacted] 91

BRIEF OF THE RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

RICHARD R. McGINNIS,
RICHARD WALLER,
D. BAILEY MERRILL,
Counsel for Respondent.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA, Petitioner, vs. NELLIE B. WIGGINTON, Respondent.	No. 1242.

BRIEF OF THE RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

I.

OPINION OF THE COURT BELOW.

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit (R. 61-74) is reported in 126 F. (2d) 659.

II.

JURISDICTION.

1. The judgment of the Circuit Court of Appeals which the petitioner seeks to have reviewed was entered February 9, 1942 (R. 74).

2. A petition for rehearing was filed by the petitioner on February 20, 1942 (R. 75).

3. The petition for rehearing was not entertained by the Circuit Court of Appeals, but was ordered stricken from the files of that Court because of the impertinent and scandalous matter contained therein on April 13, 1942 (R. 75).

4. The petition for a writ of certiorari was filed with the clerk of this court on May 18, 1942, this being more than three months after the entry of the judgment of the Circuit Court of Appeals which the petitioner seeks to have reviewed by this Court.

5. The period for applying for a writ of certiorari in the case at bar was not extended by a Justice of this court.

6. The statutory provision which is believed to deny this Court jurisdiction to allow or entertain a writ of certiorari in the case at bar because the petition for a writ of certiorari was filed too late is Acts of Cong., Feb. 13, 1925, C. 229, Sec. 8 (a, b, d) (43 Stat. 940), 28 U. S. C. 350.

7. The cases believed to sustain the respondent's contention that a petition for rehearing which is not entertained by the Court, but which is ordered stricken from the files, does not extend the time for filing a petition for a writ of certiorari beyond the three months period following the entry of the judgment by the Circuit Court of Appeals are as follows:

National Labor Relations Board v. Mackay Radio & Telegraph Co., 304 U. S. 333, 343;
United States v. Seminole Nation, 299 U. S. 417, 421;
Citizens Bank of Michigan City v. Mary Opperman, 249 U. S. 448, 450;
United States v. Charles E. Ellicott, 223 U. S. 524, 539;
Kingman & Co. v. Western Manufacturing Co., 170 U. S. 675, 678;

Northern Pacific R. R. Co. v. James Holmes, 155 U. S. 137, 138;
Aspen Mining & Smelting Co. et al. v. Margaret Billings et al., 150 U. S. 31, 36;
Texas Pacific Railway Co. v. James Murphy, 111 U. S. 488, 489;
Brockett v. Brockett, 2 Howard 238, 241.

III.

STATEMENT OF THE CASE.

The respondent-plaintiff, Nellie B. Wigginton, brought this action against the petitioner-defendant, The Order of United Commercial Travelers, to receive a five thousand dollar ($5,000.00) death benefit due under a contract which insured her husband, Charles S. Wigginton, against death by accidental means (R. 1-5). The contract of insurance resulted from the membership of Charles S. Wigginton in The Order of United Commercial Travelers, and was evidenced by a certificate of membership (R. 4) and a certificate of insurance (R. 5).

The Order of United Commercial Travelers defended this action on the ground that subsequent to the time Charles S. Wigginton became a member of the Order and was issued the certificate of insurance, the Order amended its constitution to include the following language:

> "Nor shall the Order be liable for any death benefit when the member dies as the result of injuries sustained as a result of a gunshot wound or the alleged accidental discharge of firearms where there is no eyewitness except the member himself, in any amount greater than Five Hundred Dollars ($500.00)."

And that Charles S. Wigginton died as the result of injuries sustained as the result of a gunshot wound where there was no eyewitness except the member himself (R. 11-13).

Nellie B. Wigginton contended, first, that under the facts in the case at bar the requirements of the eyewitness clause had been met, and, second, that this eyewitness clause was invalid, (a) because it was an attempt to contract as to a rule of evidence and therefore contrary to public policy, and (b) because the Order did not have the power to adopt such an amendment to its constitution as this and affect the rights of members who held certificates of insurance prior to the date of the adoption of the amendment.

The facts as stipulated by the parties relevant to the death of Charles S. Wigginton are as follows (R. 26-27):

> "12. On November 4, 1939, the insured member, Charles S. Wigginton, received a gunshot wound as the result of the discharge of a firearm and as the result of said gunshot wound, and, independently of all other causes, died within a few seconds thereafter.
>
> "13. The insured member's office on November 4, 1939 was in room 906 on the ninth floor of the Citizens National Bank Building in the City of Evansville. About 12:15 o'clock on the afternoon of November 4, 1939, he took his shotgun and placed it on his desk in his office for the purpose of cleaning it. He also placed on his desk at the same time a can of oil, a cleaning rag, the cleaning rod and his pocket knife, and actually started to clean the gun. This was observed by Mildred McGowan, his secretary, who left the office about 12:15 p. m., and at the time she left the office he was cleaning the gun.
>
> "Reese Young was a coal dealer in the City of Evansville who purchased coal from Mr. Wigginton's company. Shortly before 12 o'clock noon, he had called Mr. Wigginton by telephone and made an appointment for about 1:30 p. m. to talk to him about the problem of a shortage of coal and his desire to get regular deliveries.
>
> "After Mr. Wigginton's secretary left the office, he

also left his office and was taken to the ground floor of the building in an elevator operated by Freda Chapel. This was about 12:45 p. m. He returned to the elevator about ten (10) minutes before his death and was taken to the ninth floor of this office building in an elevator operated by Ocie Lemon, with whom he had a conversation while on the elevator.

"Between 1:15 and 1:30 p. m., Reese Young stepped from the elevator on the ninth floor of this building, and immediately after stepping from the elevator, and before taking more than three (3) steps from it, he heard a sound resembling a gunshot. At this time he was in a position where he could see the length of the hallway to the door of Charles S. Wigginton's office, but he could not see into the office. He did not see any person in the hallway at that time. The door of Mr. Wigginton's office opened off of the side of the hallway and Reese Young could not see into his office until he reached the doorway. He walked without accelerating his speed from that point down the hallway, a distance of fifty-three (53) feet, taking him approximately twelve (12) seconds from the time he heard the gunshot to the office of Charles S. Wigginton, and saw that the door was open and saw the body of Charles S. Wigginton lying on the floor of the office, and saw the shotgun and cleaning articles lying on the desk with the barrel of the shotgun pointed toward the chair of Mr. Wigginton behind his desk. He did not see anyone else in the room at that time.

"In a few moments several other people came into the room. A physician, Dr. Herbert Dieckman, was immediately called, and it was found that Charles S. Wigginton had died from a gunshot wound to his left chest and heart and that death was practically instantaneous. One barrel of the shotgun which was lying on the desk had been discharged.

"14. Each of the parties is entitled to any and all of the inferences and presumptions of fact and law resulting from the foregoing to the same extent as if the evidence contained in this stipulation had been pre-

sented to the court by the oral testimony of witnesses."

The United States District Court for the Southern District of Indiana found for the plaintiff, Nellie B. Wigginton, and rendered judgment against the defendant, The Order of United Commercial Travelers, in the sum of five thousand two hundred sixty-two and 50/100 dollars ($5,262.50) (R. 28).

The case was appealed to the United States Circuit Court of Appeals for the Seventh Circuit and that Court affirmed the judgment of the District Court (R. 74). The judgment was affirmed on the ground that there was an eyewitness within the meaning of the amendment to the constitution of The Order of United Commercial Travelers (R. 61-73). Having decided that the requirements of the eyewitness clause had been satisfied, the Circuit Court of Appeals declined to pass upon the question as to the validity of the eyewitness clause and upon the subordinate question as to whether or not a federal court sitting in Indiana is bound by the Indiana Uniform Judicial Notice of Foreign Law Act in a case originating in a state court (R. 63).

After expressing its approval of the action of the District Court in holding there was an eyewitness in the case at bar, the Circuit Court of Appeals announced an alternate reason affirming the judgment of the District Court. The Court stated that the eyewitness clause under consideration in the case at bar is ambiguous in that it is not clear whether the clause requires an eyewitness to the dying or to the shooting. The Court held that it could be reasonably inferred that Reese Young was an eyewitness to the dying of Charles S. Wigginton, and that for this reason the requirements of the eyewitness clause had been met (R. 73-74).

IV.

ARGUMENT.

SUMMARY OF ARGUMENT.

Point A. The petitioner is not entitled to a writ of certiorari since the petition for a writ of certiorari was filed more than three (3) months after the entry of the judgment by the Circuit Court of Appeals.

1. The federal statutes require that an application to the Supreme Court of the United States for a writ of certiorari to a Circuit Court of Appeals be made within three (3) months after the entry of the judgment by the Circuit Court of Appeals.

2. A petition for rehearing filed in the Circuit Court of Appeals which is not entertained by the Court, but which is ordered stricken from the files of the Court, will not extend the time for application to the Supreme Court for a writ of certiorari beyond the three (3) months period following the entry of the judgment by the Circuit Court of Appeals.

Point B. The petitioner in its petition for a writ of certiorari has not stated sufficient reasons to warrant the issuance of a writ of certiorari by this Court to the Circuit Court of Appeals in the case at bar.

1. The petitioner holds that the Circuit Court of Appeals, in construing the eyewitness clause so as to allow a recovery for the plaintiff, has decided a question of Indiana law in a way probably contrary to the local law of Indiana, but the petitioner admits that there is no decided case in Indiana expressly construing the eyewitness clause (Pet. Br., p. 9), and this Court has held that in the absence of a case in point this Court will not disturb the interpretation of the local law of a state as announced by a Federal

District Court judge of that state and a Circuit Court of Appeals having jurisdiction of that state.

2. The interpretation given the eyewitness clause by the Circuit Court of Appeals in holding that under the facts of the case at bar the requirements of the eyewitness clause are satisfied is not illogical and therefore is not contrary to the general principles of law as stated by the courts of Indiana.

3. The decision of the Circuit Court of Appeals in holding that the eyewitness clause in the case at bar is ambiguous is not illogical and therefore is not contrary to the general principles of law as stated by the courts of Indiana.

Point C. The question as to whether or not a federal court sitting in Indiana would be bound by the Indiana Uniform Judicial Notice of Foreign Law Act in a case originating in a state court was not decided by the Circuit Court of Appeals. So long as the decision of the Circuit Court of Appeals to the effect that the eyewitness clause has been satisfied remains in force, the question as to the validity of the eyewitness clause and the subordinate question relative to the Indiana Uniform Judicial Notice of Foreign Law Act are moot questions and therefore should not be made the basis for a writ of certiorari.

POINT A.

The petitioner is not entitled to a writ of certiorari since the petition for a writ of certiorari was filed more than three (3) months after the entry of the judgment by the Circuit Court of Appeals. The judgment of the Circuit Court of Appeals for the Seventh Circuit, which the petitioner asks this Court to review, was entered on February 9, 1942 (R. 74). The petition for a writ of certiorari was filed on May 18, 1942, this being more than three (3)

months following the date of the entry of the judgment by the Circuit Court of Appeals.

The applicable federal statute provides:

> "No writ of error, appeal, or writ of certiorari, intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained unless application therefor be duly made within three (3) months after the entry of such judgment or decree, excepting that writs of certiorari to the Supreme Court of the Philippine Islands may be granted where application therefor is made within six (6) months. For good cause shown either of such periods for applying for a writ of certiorari may be extended not exceeding sixty (60) days by a Justice of the Supreme Court." Acts of Congress, February 13, 1925, c. 229, sec. 8 (a, b, d) (43 Stat. 940), 28 U. S. C. 350.

Since the petitioner did not comply with this statute, the petitioner is not entitled to a writ of certiorari.

The petitioner maintains, however, that since it filed its petition for rehearing within the time required by the Circuit Court of Appeals, which petition for rehearing was ordered stricken from the files by the Circuit Court of Appeals on April 13, 1942 (R. 75), the three (3) months period within which to file a petition for a writ of certiorari dates from April 13, 1942.

The petitioner is in error in supposing that the filing of its petition for rehearing in the Circuit Court of Appeals extended the time for filing a petition for a writ of certiorari in this court beyond the three (3) months period following the date of the entry of the judgment by the Circuit Court of Appeals. The rule as established by this Court with reference to the filing of a petition for rehearing provides that if a motion for new trial or petition for rehearing is seasonably filed and entertained by the Court, the time limited for a writ of error or certiorari does not

begin to run until the motion or petition has been disposed of by the court in which it is filed.

National Labor Relations Board v. Mackay Radio & Telegraph Co., 304 U. S. 333, 343;
United States v. Seminole Nation, 299 U. S. 417, 421;
Citizens' Bank of Michigan City v. Mary Opperman, 249 U. S. 448, 450;
United States v. Charles E. Ellicott, 223 U. S. 524, 539;
Kingman & Co. v. Western Manufacturing Co., 170 U. S. 675, 678;
Northern Pacific R. R. Co. v. James Holmes, 155 U. S. 137, 138;
Aspen Mining & Smelting Co. et al. v. Margaret Billings et al., 150 U. S. 31, 36;
Texas Pacific Railway Co. v. James Murphy, 111 U. S. 488, 489;
Brockett v. Brockett, 2 Howard 238, 241.

It is to be noted that in addition to the filing of a petition for rehearing, the Court must actually entertain the petition in order to extend the time for filing the application for a writ of certiorari. In the case at bar the record definitely shows that the Circuit Court of Appeals did not entertain the petition for rehearing filed by the petitioner, for it shows that the Circuit Court of Appeals ordered the petition for rehearing stricken from the files because of the scandalous and impertinent matters therein contained (R. 75). This is the most forceful manner in which the Circuit Court of Appeals could show that it had refused to entertain the petition for rehearing. Being thus unable to show that subsequent to the entry of the judgment of February 9, 1942, it filed a petition for rehearing that was entertained by the Court, the petitioner must be bound by the rule which requires that it file its petition for a writ of certiorari within three (3) months after the date of the entry of the judgment. Having failed to do this, the petitioner is not entitled to a writ of certiorari.

The petitioner argues that even a petition for rehearing that is stricken from the files because of the scandalous and impertinent matters contained therein must be held to extend the time for filing and application for a writ of certiorari. It would be possible, the petitioner argues, for the Circuit Court of Appeals to strike from the files a scandalous and impertinent petition for rehearing more than three (3) months after the judgment had been entered, thus depriving the petitioner of any right to apply for a writ of certiorari unless the time for application be computed from the date that the petition is ordered stricken from the files. The petitioner contends that regardless of the nature of the language contained in its petition for rehearing, the mere filing of the petition should extend the time for application for a writ of certiorari.

The respondent does not agree with this contention.

The effect of the action of the Circuit Court of Appeals in striking the petition for rehearing from the files was to declare that the instrument which the petitioner filed as a petition for rehearing was so offensive to the Court that it could not be accepted by the Court as a petition for rehearing, and so as a matter of record in the case at bar no petition for rehearing was actually filed. Corpus Juris, Vol. 49, p. 774, Pleading, Sec. 1126.

It is to be noted that the petitioner does not question the action of the Circuit Court of Appeals in holding that the petition for rehearing contained such scandalous and impertinent matter as to require its being stricken from the files without any consideration by the Court, and the respondent therefore assumes that the petitioner recognizes that the character of the petition for rehearing which it filed merited the exact treatment which the Circuit Court of Appeals gave it. If a party, in availing itself of the privilege of petitioning a court for a rehearing, chooses

to fill the petition with such scandalous and impertinent matter that the court in which it is filed is justified in not only refusing to consider the petition, but in actually striking it from the files, then the offending party cannot complain when it finds itself deprived of the advantages that would have accrued to it had it filed a proper petition for a rehearing. If the Circuit Court of Appeals were to act wrongfully in striking a petition for rehearing from the files, certainly this Court could grant relief from that action of the Circuit Court of Appeals and thus protect a litigant from the malicious or spiteful action of a prejudiced court. Where, however, the party admits the propriety of the action of the Circuit Court of Appeals in striking the petition for rehearing from the files, it must accept the results that follow from its failure to file a pleading which could qualify as a proper petition for a rehearing. The loss of any advantages that would have come from filing a petition for rehearing is certainly one of the punishments that is meted out by the Court in striking a petition from the files because of the scandalous and impertinent matter contained therein.

It should also be noted that the Circuit Court of Appeals ordered the petition for rehearing stricken from the files on April 13, 1942 (R. 75), and that the three (3) months period following the entry of the judgment by the Circuit Court of Appeals on February 9, 1942 (R. 74), did not expire until May 9, 1942. This gave the petitioner an ample period of time within which either to file its petition for a writ of certiorari or to apply to a judge of this court for an extension of the time within which to file a petition for a writ of certiorari as provided by statute. The petitioner did neither.

Upon the state of the record it is earnestly submitted by the respondent that the petitioner is not entitled to a writ of certiorari because its application for a writ of certiorari has been filed too late.

POINT B.

The petitioner in its petition for a writ of certiorari has not stated sufficient reasons to warrant the issuance of a writ of certiorari by this Court to the Circuit Court of Appeals.

The principal reason advanced by the petitioner for the granting of the writ is that the Circuit Court of Appeals, in construing the eyewitness clause so as to permit the respondent to recover under the facts in this case, has decided a question of Indiana law in a way probably contrary to the local law of Indiana. The petitioner admits that there is no decided case in Indiana which establishes the law of Indiana on the question of the construction of the eyewitness clause (Pet. Br. p. 9). The petitioner merely cites cases which state some very general principles of Indiana law and argues that the decision of the Circuit Court of Appeals in the present case violates these general principles of Indiana law.

This Court, in the case of Alexander MacGregor v. State Mutual Life Assurance Company of Worcester, Massachusetts, Adv. Ops. October Term, 1941, No. 179, 86 L. Ed. 559, stated the rule that where a federal district judge sitting in a particular state and a Circuit Court of Appeals having jurisdiction of that state pass upon a question of purely local law of that state, and there is no decision by a court of that state on the question, then the Supreme Court will not disturb the ruling of the federal judges. In that case the Court stated:

> "No decision of the Supreme Court of Michigan, or of any other court of that state, construing the relevant Michigan law, has been brought to our attention. In the absence of such guidance, we shall leave undisturbed the interpretation placed upon purely local law by a Michigan federal judge of long experience and by three circuit judges whose circuit includes Michigan."

In the case at bar the judgment of the District Court was rendered by the Honorable Robert C. Baltzell, who for many years has been a federal district judge of the State of Indiana and who previous to his appointment was a judge in an Indiana Circuit Court. The opinion of the Circuit Court of Appeals for the Seventh Circuit was written by the Honorable Sherman Minton, who, before his appointment as a judge in the Circuit Court of Appeals for the Seventh Circuit, was an Indiana lawyer. It is expressly submitted that the present case falls within the rule set out in the case of MacGregor v. State Mutual Life Assurance Company, Adv. Ops. October Term, 1941, No. 179, 86 L. Ed. 559, in which this Court refused to disturb the opinion of the Michigan federal judges when there was no case decided by a Michigan state court on the question involved.

Despite the fact that this Court has previously indicated that it will not disturb the decision of federal judges of a given state with regard to the local law of that state when there is no decision of a court of that state on the question, still respondent wishes to point out that the decision of the Circuit Court of Appeals in construing the eyewitness clause so as to allow recovery for the plaintiff under the facts of this case is not contrary to the general law of the State of Indiana.

The gist of the petitioner's argument on this point seems to be that the action of the Circuit Court of Appeals in construing the eyewitness clause in favor of the plaintiff was illogical and that, since the law of Indiana is logical, the decision of the Circuit Court of Appeals is in conflict with the Indiana law. The respondent has never been able to follow the petitioner along this line of reasoning. It seems quite simple, however, to show that the construction placed upon this eyewitness clause by the Circuit Court of Appeals is entirely consistent with the gen-

eral rules of Indiana law. The leading Indiana case dealing with the construction of a contract of insurance is that of Masonic Accident Insurance Company v. Jackson, 200 Ind. 472, 482, 164 N. E. 628, 631. The Supreme Court of Indiana in that case laid down the following rule to guide courts in construing contracts of insurance:

> "An insurance policy should be so construed as to effectuate indemnification to the insured or his dependent beneficiary against loss, rather than to defeat it.
>
> "Where any reasonable construction can be placed on a policy that will prevent the defeat of the insured's indemnification for a loss covered by general language, that construction will be given.
>
> "It is the duty of the court to give such construction to an accident policy, if the language fairly admits, as will make it of some substantial value and carry out the intention expressed therein, that liability is incurred where death occurs from accidental injury."

Thus we see that it is the policy of the law of Indiana to interpret a contract of insurance so as to allow recovery by the beneficiary of the insurance if this can be done by placing any reasonable construction upon the language of the policy.

The respondent submits that the general law on the subject of eyewitness clauses, including the cases quoted in the opinion of the Circuit Court of Appeals (R. 64-73), clearly supports the decision that the stipulated facts showed an eyewitness.

The opinion of the Circuit Court of Appeals (R. 61-73) carefully discusses the cases of Lewis v. Brotherhood Accident Co., 194 Mass. 1, 79 N. E. 802; Pride v. Interstate Business Men's Accident Association, 207 Iowa 167, 216 N. W. 62; Ellis v. Interstate Business Men's Accident As-

sociation, 183 Iowa 1279, 168 N. W. 212, and Order of United Commercial Travelers of America v. Knorr, 112 Fed. (2d) 679, showing that the general law on the subject of the eyewitness clause requires a decision that there was an eyewitness in the case at bar. The respondent cannot improve upon this able discussion of the general law on the subject. The respondent wishes to point out, however, that the petitioner itself accepts the case of Lewis v. Brotherhood Accident Co., 194 Mass. 1, 79 N. E. 802, as correctly interpreting the eyewitness clause and as being the leading case on the subject (Pet. Br., p. 36).

After first determining that the facts in the case at bar satisfied the eyewitness clause under the theory of the law as first set out in the case of Lewis v. Brotherhood Accident Co., 194 Mass. 1, 79 N. E. 802, the Circuit Court of Appeals proceeded to point out an alternate reason as to why the eyewitness clause was satisfied. As stated in the opinion of the Circuit Court of Appeals (R. 73-74):

> "Furthermore, we think the provision of the constitution of the appellant order under consideration in this case is ambiguous. It provides that there must be an eyewitness. Witness to what? The dying or the shooting? Surely it cannot be said that this provision is clear as to which one is meant. We are unable to determine from a reading of the provision which one is meant. Contracts of insurance are construed most strongly against the insurance company and so as to give protection to the insured if this can be reasonably done. Masonic Insurance Co. v. Jackson, 200 Ind. 472, 164 N. E. 628. In the case at bar there was an eyewitness to the death of the insured. Mr. Young was upon the scene within twelve seconds. It is a fair inference which we are authorized in this case to draw, that Young saw Wigginton dying. It is reasonable to construe the policy which is ambiguous, so as to mean that there shall be an eyewitness to the 'dying.' We so construe it. Young was the eyewitness to the dying. Therefore, the requirements of the policy were met."

The petitioner maintains that in holding the eyewitness clause to be ambiguous, the Circuit Court of Appeals has violated a general rule of Indiana law which requires that language be given its popular and usual significance.

The respondent submits that if the eyewitness clause in question is carefully read with a view toward determining the proper grammatical construction which should be placed upon the clause, it is impossible to say whether the words "where there is no eyewitness" do refer to the dying or to the shooting. The petitioner does not question this point. The petitioner merely indulges in a long discussion concerning the general mental attitude of average men and asks this Court to conclude from its knowledge of the general attitude of ordinary men that they could not have meant there must be an eyewitness to the death of a person because the thought of requiring an eyewitness to the death of any person is so abhorrent to the average man. We submit that no such analysis of human nature can be brought into this case so as to make clear and certain a clause that is grammatically ambiguous.

The petitioner also argues that the ambiguity is eliminated by the use of the words "except the member himself." The petitioner contends that it would be ridiculous to think of the member himself as being an eyewitness to his own death. The respondent submits that it is just as reasonable to consider a person as a possible eyewitness to his own death as to consider him as a possible eyewitness to the accident which immediately caused his death. The words "except the member himself" are not sufficient to eliminate the ambiguity resulting from the grammatical construction of this eyewitness clause.

The petitioner then insists that the Circuit Court of Appeals should not have found such an ambiguity to exist simply because no other court in the thirty-five (35) years that eyewitness clauses have been under investigation has found such ambiguity to exist. This is a fallacious argument, since the mere fact that a question has not been

raised before is not conclusive as to the fact that no such question exists. However, when the eyewitness clauses of other insurance contracts which have come before the courts are considered, it is easy to understand how the Circuit Court of Appeals in the case at bar considered the present eyewitness clause ambiguous, whereas other courts in passing upon other eyewitness clauses have not found any ambiguity to exist. The eyewitness clause in the case at bar provides:

> "Nor shall the Order be liable for any death benefit when the member dies as the result of injuries sustained as a result of a gunshot wound or the alleged accidental discharge of firearms where there is no eyewitness except the member himself, in an amount greater than Five Hundred Dollars ($500.00)" (R. 24-25).

Other eyewitness clauses read as follows:

> "The Society shall not be liable for the payment of double indemnity under any beneficiary certificate providing for double indemnity in case of the death of the member by accident, where it is claimed that death resulted from accidental drowning, cutting, poisoning, hanging, inhalation of gas, discharge of firearms or shooting, unless at least one person other than the member was an eyewitness of such drowning, cutting, poisoning, hanging, inhalation of gas, discharge of firearms or shooting."
>
> Affidavit of Secretary of Woodmen of the World Life Insurance Society, Petition for Certiorari, p. 30.

> "H. The Association shall not be liable for death, disability or specific loss in excess of one-tenth of the amounts of these by-laws provided for indemnity for death, disability or specific loss when said death, disability or specific loss arises from or is effected or aggravated by any of the following causes, conditions or acts or results therefrom, to wit: * * * death or injuries resulting from the discharge of firearms where the member (or beneficiary in case of death of the mem-

ber) is unable to prove by actual eyewitnesses other than himself or the claimant, the nature and circumstances of the discharge of the firearms and the infliction of the injury."

Affidavit of Secretary-Treasurer of Iowa State Traveling Men's Association, Petition for Certiorari, p. 28.

"* * * if the loss be sustained as the result of the discharge of a firearm unless the claimant shall establish the accidental cause of the discharge by the testimony of a person other than the insured or the claimant who saw the cause in operation at the time of the discharge."

Pride v. Interstate Business Men's Accident Association, 207 Iowa 167, 216 N. W. 62.

"The association shall not be liable * * * for injuries or the results therefrom under any of the following circumstances, to-wit: injuries resulting from the discharge of firearms where there is no eyewitness to the discharge except the member himself."

Fiedler v. Iowa State Traveling Men's Association, 179 N. W. 317.

"This association shall not be liable for the payment of benefits or indemnity on account of disability or death resulting from a bodily injury caused by the discharge of firearms, unless the member or person claiming by, through or under any certificate issued to such member shall establish the accidental character of such discharge by the testimony of at least one person, other than the member, who was an eyewitness of the event."

Ellis v. Interstate Business Men's Accident Association, 183 Iowa 1279, 168 N. W. 212;

Roeh v. Business Men's Protective Association, 164 Iowa 199, 145 N. W. 479, 480.

"The association shall not be liable for the payment of double indemnity when any beneficiary certificate providing for double indemnity in case of the death of the member by accident, where it is claimed that

death resulted from accidental drowning, cutting, poisoning, hanging, inhalation of gas, discharge of firearms or shooting, unless the fact that such drowning, cutting, poisoning, hanging, inhalation of gas, discharge of firearms or shooting, was accidental shall be established by the testimony of at least one person other than the member, who was an eyewitness to such drowning, cutting, poisoning, hanging, inhalation of gas, discharge of firearms or shooting."

Villemarette v. Sovereign Camp, W. O. W. (La. App.), 178 So. 648, 649.

"In the event of any accidental bodily injury, fatal or non-fatal, contributed to or caused by * * * drowning or shooting when the facts and circumstances of the accident and injury are not established by the testimony of an actual eyewitness * * *."

Lewis v. Brotherhood Accident Co., 194 Mass. 1, 79 N. E. 802, 804.

"If the insured receives bodily injuries, fatal or otherwise, by the discharge of firearms * * * the claimant shall establish the accidental character of the injury by the testimony of at least one eyewitness to the accident other than the insured himself."

Bankers Health & Accident Association v. Wilkes (Tex. Civ. App.), 209 S. W. 230, 233.

"Unless the claimant shall establish the accidental character of the injury by the testimony of a person other than the member or the claimant who was an eyewitness to all of the circumstances of the casualty."

Lundberg v. Interstate Business Men's Accident Association (Wis.), 156 N. W. 482.

The respondent submits that the ambiguity which actually exists in the language of the eyewitness clause in the case at bar was expressly eliminated by the careful language of the eyewitness clauses used in other cases. The

petitioner should not be permitted to avail itself of the careful language of other insurance contracts to remove an obvious ambiguity from its own contract of insurance.

POINT C.

As a final reason for requesting that this court issue a writ of certiorari in the case at bar, the petitioner points out that it would be possible for this court, if it were to review the opinion of the Circuit Court of Appeals, to settle the question as to whether or not under the rule of Erie Railroad Company v. Tompkins, 304 U. S. 64, a federal court sitting in Indiana is bound by the Indiana Uniform Judicial Notice of Foreign Law Act, Acts Indiana General Assembly, 1937, ch. 124, secs. 1 to 7, p. 703; Burns' Indiana Statutes Annotated 1933 (Cum. Pocket Supp., Dec., 1941) 2-4801 to 2-4807, in a case originating in a state court. (Petition for Certiorari 24) (Pet. Br. p. 49.) This question is subordinate to the general question as to the validity of the eyewitness clause in the present case (Pet. Br. pp. 49-52).

The Circuit Court of Appeals declined to pass upon the validity of the eyewitness clause (R. 63), using this language:

> "We lay to one side the question of the validity of the amendment to the constitution and proceed to a determination of whether under the undisputed facts in this case there was an eyewitness within the meaning of the amendment,"

and consequently did not pass upon the question as to whether or not a federal court sitting in Indiana is bound by the Indiana Uniform Judicial Notice of Foreign Law Act in a case originating in a state court (Petition for Certiorari 16). So long as the decision of the Circuit Court of Appeals to the effect that there was an eyewitness

stands, the question as to the Indiana Uniform Judicial Notice of Foreign Law Act remains a moot question in this case.

Notwithstanding this fact, the petitioner urges this Court to review the case at bar so that it may decide this question of law for the benefit of the bench and bar in the future. The petitioner urges that this should be done in the case at bar for the benefit of impecunious litigants and timid attorneys who may in the future wish for a decision on the point (Petition for Certiorari 16-17, 25). It is earnestly submitted by the respondent that, regardless of the willingness of the petitioner to assume the expense and burden of presenting the case to this Court for the benefit of the bench and bar in the future, this respondent, who is now the widow of Charles S. Wigginton, is not in a position to assume the expense and burden of presenting her side of this case to this Court merely for the purpose of aiding litigants and lawyers in the future. Certainly no litigant should be required to assume the burden of presenting a question to this Court when that question is not vital to the decision of the case, simply because it would give this Court an opportunity to settle an otherwise undecided point of law. The obvious injustice that would result to the respondent in this particular case makes this argument of the petitioner ridiculous.

For the reasons above stated, the respondent respectfully submits that this petition for a writ of certiorari from this Court to the Circuit Court of Appeals for the Seventh Circuit should be denied.

Respectfully submitted,

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